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IN THE

# Supreme Court of the United States

ROBERT H. HOFFMANN, HEIDEMARIE KRÜGER, and
The Estate of HENRIETTE HOFFMAN VON SCHIRACH,
KLAUS VON SCHIRACH, Executor,

*Petitioners*,

*v.*

UNITED STATES OF AMERICA
and JOHN D. ASHCROFT,
Attorney General of the United States of America,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether, pursuant to the Hague/Geneva Protocols,[1] after the Army lawfully brings foreign-owned paintings and photographs to the United States for the purpose of writing history books, the Government may confiscate these properties in the United States in direct violation of those Protocols, free from the Fifth Amendment Wrongful Taking Clause's compensation requirements, as the Federal Circuit held, or whether this Court's holding in *Russian Volunteer Fleet v. United States,* 282 U.S. 481 (1931), and the Second Circuit's holding in *Sardino v. Federal Reserve Bank,* 361 F.2d 106 (1966), continue to extend Wrongful Taking protection to these foreign-owned paintings and photographs located in the United States?

2. Since the Hague/Geneva Protocols, pursuant to Article VI of the Constitution, have the force and effect of an enacted United States statute, do Plaintiffs have a private right of action against the United States under those Protocols cognizable by the district court, independent of the Fifth Amendment, as Plaintiffs contend?

3. Whether pursuant to the Court's decision in *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959), and a line of state supreme court decisions, equitable estoppel precludes the Government's statute of limitations defense to its confiscation of Plaintiffs' paintings and photographs, as Plaintiffs contend, or whether those confiscations are protected by a four year statute of limitations, as the Federal Circuit held?

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1. There are 56 Articles in the Regulations Respecting the Laws and Customs of War on Land contained in the Annex to the Hague Convention (IV), adopted by the Geneva Protocols of 1929 (hereinafter, "Hague/Geneva Protocols"). The relevant Articles in the Regulations are reproduced in Appendix H at 84a-88a. There are four Articles in the Convention Respecting the Laws and Customs of War on Land (Hague IV 1907). They are reproduced in Appendix H at 88a-89a.

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Petitioners Robert H. Hoffmann, Heidemarie Krüger, and Estate of Henriette Hoffmann von Schirach, Dr. Klaus von Schirach, Executor, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

## OPINIONS AND ORDERS ENTERED

The 2004 judgment of the Court of Appeals for the Federal Circuit (unpublished) affirming *per curiam* the 2003 judgment of the District Court for the District of Columbia is reproduced as Appendix A at 1a. The 2003 memorandum opinion of the district court (266 F. Supp. 2d 27) and the judgment of the district court are reproduced as Appendices B at 3a, and D at 36a. The July 9, 2004, order of the Federal Circuit (unpublished) denying Plaintiffs' petition for panel rehearing and for rehearing en banc is reproduced as Appendix C at 34a.

The 2001 opinion of the Federal Circuit (17 Fed. Appx. 980) is reproduced as Appendix E at 37a. The 1999 opinion of the district court (53 F. Supp. 2d 483), is reproduced as Appendix F at 55a. The 1999 judgment of the district court (unpublished) is reproduced as Appendix G at 82a.

## STATEMENT OF THE BASIS FOR JURISDICTION

The court of appeals entered its judgment on May 4, 2004, and denied Plaintiffs' petition for rehearing on July 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION, TREATIES, STATUTES, PRESIDENTIAL MESSAGE, RULES, AND DEP'T OF THE ARMY PAMPHLET INVOLVED

The pertinent provisions of the following constitutional provision, treaty, statutes, presidential message, rules, and Dep't of the Army Pamphlet are set forth in Appendix H:

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II. The Annex to the Hague Convention (IV) Adopted by the Geneva Protocols of 1929, Regulations Respecting the Laws and Customs of War on Land 84a

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## STATEMENT OF THE CASE

### A. Procedural history of the 22 years of litigation in this case

1. In a related case the Southern District of Texas ("S.D.Tex.") awarded a Federal Tort Claims Act ("FTCA") judgment for damages of $7,949,908 for 500,000 photographs and 115,000 glass plate negatives ("615,000 Photographs") removed by the U.S. Army from the archives of the Hoffmann Publishing Company of Munich, Germany (a sole proprietorship owned by now deceased Plaintiff Hoffmann Jr.), and four watercolors painted by Adolf Hitler ("Watercolors") owned by Hoffmann Sr. *Price v. United States*, 707 F. Supp. 1465 (S.D.Tex. 1989). In 1995, the Fifth Circuit reversed the FTCA judgment, holding that the S.D.Tex. had no jurisdiction as to the 615,000 Photographs because the FTCA suits were filed prematurely. 69 F.3d 46 (5th Cir. 1995), *modified on rehearing*, 81 F.3d 520 (5th Cir.), *cert. denied,* 519 U.S. 927 (1996). The Fifth Circuit

also reversed as to the Watercolors, stating that while Plaintiffs sued on a tort committed in the United States, there was an earlier tort by the same tortfeasor committed in Germany and the FTCA does not apply to torts committed outside the United States. *Ibid.*

2. In 1989 (six years before the 1995 Fifth Circuit ruling), Plaintiffs filed a second suit to cure the Government's defense of premature filing of the case in which the $7.95 million judgment was rendered. After the Fifth Circuit remanded that case for proceedings in the second suit, on May 15, 1996, the S.D.Tex. judge criticized the Government for its 14-year refusal to submit to discovery. Within a month, the Government disclosed for the first time that in 1945 the U.S. Army had taken an additional 2,000,000 photographs and 235,000 glass plate negatives ("2,235,000 Photographs") from the Hoffmann Publishing Company archives, removing them (along with the 615,000 Photographs involved in the Fifth Circuit case) first to its Freising Germany Intelligence Center and then to the United States.

3. While Plaintiffs exhausted their administrative remedies on claims they filed, in August and in September 1996, the S.D.Tex. entered two orders directing the Government to produce discovery by December 1996, of a seven page list of documents and to permit inspection of the 2,235,000 Photographs. Through a mandamus application, the Government sought a delay in discovery and an immediate Fifth Circuit ruling on an Anti-Assignment Act defense as to Plaintiff Price, which if adopted, would require the dismissal of Price and the transfer of the case from the S.D.Tex. to the District Court for the District of Columbia ("DDC").

4. In late 1996 the Fifth Circuit stayed discovery pending its ruling on the Government's mandamus petition, then in December 1996, entered an order directing the S.D.Tex. to rule on whether Price was an improper Plaintiff in the case, and if so to dismiss him and transfer the case to the DDC. The Fifth

Circuit stayed compliance with the outstanding discovery orders until the S.D.Tex. ruled on whether Price was a proper Plaintiff.

5. In March 1998, the S.D.Tex. dismissed Price as a Plaintiff[2] and transferred the case to the DDC. Fourteen months previous to this S.D.Tex. ruling, Plaintiffs filed their third suit against the Government–this suit dealing with the 2,235,000 Photographs. The bases for the suit were Fifth Amendment Wrongful Taking, contract damages and Article 53 of the Hague/ Geneva Protocols. The pending civil actions in the S.D.Tex. were transferred to the DDC with only the Hoffmann family members (all aliens/citizens of Germany) as Plaintiffs. On the date of transfer, the Government was obliged to respond to the extant S.D.Tex. discovery orders within one month.

6. The DDC ignored the outstanding S.D.Tex. discovery orders and in 1999 granted summary judgment against Plaintiffs.[3] (Appendix F at 55a.) After appeal by Plaintiffs, in 2001 the Federal Circuit remanded the case for the DDC to consider Plaintiffs' causes of action for breach of contract, Wrongful Taking under the Fifth Amendment, and violations of Hague/Geneva Protocols, all as to the 2,235,000 Photographs. (Appendix E at 37a.)

7. After remand, without ordering enforcement of the outstanding discovery orders, on May 30, 2003, the DDC entered an opinion and judgment granting the Government's Motion for Summary Judgment and dismissing Plaintiffs' Complaint. (Appendices B at 3a, and D at 36a.) Plaintiffs appealed to the

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2. In dismissing Price as a Plaintiff, the S.D.Tex. held that Price had no standing to sue the Government as to the photographs taken by the Army from the Hoffmann Publishing Company archives and the Watercolors because, although Price had acquired ownership of both the photographs and Watercolors from the Hoffmann family, his purchase violated the Anti-Assignment Act, which precludes an assignee of unliquidated claims from suing the United States.

3. Reported at 53 F. Supp. 2d 483.

Court of Appeals for the Federal Circuit,[4] which affirmed (Appendix A at 1a), and later denied Plaintiffs' motion for rehearing on July 9, 2004.[5] (Appendix C at 34a.)

**B. Significant Evidentiary Facts about the Photographs**

8. In 1937, Hoffmann Jr. received a gift from Hoffmann Sr. of the family photo archive proprietorship, consisting of 2.5 million photographs and 350,000 glass plate negatives ("2,850,000 Photographs"). The Hoffmann Publishing Company's 80-year old archive by then was comparable in size to AP and UPI.

9. Hoffmann Jr. operated the photo agency through World War II and before the battles on German soil began, Hoffmann Jr. stored most of his 2,850,000 Photographs in a remote castle in Winhöring, Germany for safekeeping ("Winhöring Photographs"). After European fighting ended, in May 1945, Hoffmann Jr. was taken prisoner by the Army and was held until May 1949. Hoffmann Sr. was also arrested by the Army in May 1945 and was held until mid-1950.

10. In May 1945, the Army requisitioned Winhöring Castle as an officers' billet and discovered the Photographs there. These Winhöring Photographs were reported up the chain of command and under instructions received, in June 1945, these Photographs were shipped to what the Army officer in charge of the Photographs described as "higher headquarters." Despite discovery requests, there was no evidence provided by the

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4. Because the DDC had Little Tucker Act jurisdiction as to the Photographs and the Federal Circuit had appellate jurisdiction thereof under 28 U.S.C. § 1295(a)(2), the Federal Circuit also had appellate jurisdiction as to the other issues in the case. *United States v. Hohri*, 482 U.S. 64 (1987). *See*, *Smith v. Orr*, 855 F.2d 1544, 1547-48 (Fed. Cir. 1988).

5. In the Federal Circuit, Plaintiffs argued that the court should reverse its 2001 opinion holding that the German Plaintiffs, as foreigners, have no Fifth Amendment Wrongful Taking rights. In 2004, this issue was reargued by Plaintiffs as a basis for rehearing in the Federal Circuit.

Government as to what happened to the Winhöring Photographs until the July 1996 discovery responses in the S.D.Tex.

11. In the 1996 discovery responses, Plaintiffs learned that all of the 2,850,000 Winhöring Photographs had been taken by the Army to its Intelligence Center at Freising, Germany. Plaintiffs also learned that in the late 1940s, without notice to Hoffmann Jr., the 2,850,000 Photographs were divided among units of the Army and intelligence agencies. In addition, the War Crimes Commission selected 615,000 of the Freising Intelligence Center Photographs for use as evidence in the Nürnberg trials ("Nürnberg Photographs").[6]

12. The Nürnberg prosecutors could make no sense of the unindexed 615,000 Photographs so they located and then hired Hoffmann Jr. as a paid employee of the Army. He worked with the prosecution team until the Nürnberg prosecutions ended in 1949. During that period, Hoffmann Jr. was assured repeatedly by the Army command at Nürnberg that the Army knew the 615,000 Nürnberg Photographs belonged to Hoffmann Jr. and that those Photographs would be returned to him when the prosecutions concluded. However, in 1949, in the United States, the Army Historical Division decided to use the Nürnberg Photographs in the United States in writing a history of World War II. Hoffmann Jr. was advised by the Army Historical Division that when the history books had been written, his Nürnberg Photographs would be returned. Hoffmann Jr. protested, and Army lawyers reviewed the protest.

13. The Army lawyers realized that under the Hague/ Geneva Protocols,[7] the Army is prohibited from confiscating

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6. No explanation was offered or given by the Government for the 14-year delay (until 1996) in supplying this discovery. It is apparent, in retrospect, that the Government was well aware that discovery would reveal its duplicity and sought to avoid continued access to testimony of the original aged Plaintiffs (both of whom are now dead) to answer any questions raised by discovery responses supplied by the Government.

7. See note 1, *supra;* that treaty has the force and effect of a statute (Cont'd)

privately-owned chattels, but during World War II and the occupation that followed, the Army had the full right to take control of and seize personal property belonging to Hoffmann Jr. and use that property in Germany or in the United States. With respect to Hoffmann Jr.'s photographs, Army lawyers determined:

• the Army initially took lawful control and custody in 1945, of the 615,000 Nürnberg Photographs and then requisitioned and seized those Photographs pursuant to the Hague/Geneva Protocols[8] for use at the Nürnberg trials;

• that Treaty required the Army to return all of these Nürnberg Photographs to Hoffmann Jr.;[9]

• in 1950, the Army again lawfully seized the 615,000 Nürnberg Photographs pursuant to the same Treaty and lawfully brought them to the United States to write books;[10] and

• even though the 615,000 Nürnberg Photographs were lawfully seized, under the Hague/Geneva Protocols, the Army did not own these Photographs and owed Hoffmann Jr. the obligations of both return and compensation for the Army's use.[11]

14. In 1951, an Army general and a group of unknown others, explicitly to prevent Hoffmann Jr. from regaining his Nürnberg Photographs, concocted a plan to obtain "title" to the Nürnberg Photographs by illegally obtaining a vesting order under provisions of the Trading With the Enemy Act ("TWEA") that had expired at noon on December 31, 1946, pursuant to

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(Cont'd)

adopted and signed by the President. U.S. Const. Art. VI; *Valentine v. United States,* 299 U.S. 5, 10 (1936). (Appendix H at 84a.)

8. Appendix H at 116a-117a, 107a.

9. *Ibid.*

10. *Id.* at 107a.

11. Appendix H at 107a, 99a (§ 323), 99a-100a (§§ 326, 329-331).

President Truman's Proclamation, for TWEA purposes, that war with Germany ended as of that moment.[12]

15. This was intentional theft: the Army knew that the Government's TWEA power to vest privately-owned German property not located inside the United States prior to January 1, 1947, had terminated by President Truman's Proclamation that the war with Germany ended on December 31, 1946 and that the TWEA was inapplicable to German-owned property (the 615,000 Nürnberg Photographs) first brought to the United States by the Army more than four years after December 31, 1946.[13]

16. The Army's file, showing that the Army knew the 615,000 Nürnberg Photographs belonged to Hoffmann Jr., was concealed for 45 years (including 14 years of litigation) and was finally disclosed in July 1996. The S.D.Tex. characterized this 1951 "vesting order" as an "order of theft." (*See* ¶¶ 2-5, *supra*).

17. In 1983, the Army advised Hoffmann Jr. in writing that it had possession of *none* of the 2,235,000 Hoffmann Photographs and that the only Hoffmann Photographs in the possession of the Government were the 615,000 Nürnberg Photographs in the possession of the General Services Administration. Long withheld discovery responses, filed in 1996, proved that this was untrue.

### C. Significant Evidentiary Facts About the Four Watercolors

18. Hoffmann Sr.'s four Watercolors, presently in the Government's possession in Alexandria, Virginia, were removed to the United States from Germany by the Army in 1951. As World War II ended, Hoffmann Sr. stored the Watercolors

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12. President Truman's Proclamation 2714, effective at noon December 31, 1946, 12 Fed. Reg. No.1, p.1 (Jan. 1, 1947).

13. Had the TWEA been applicable after noon on December 31, 1946, trade with Germany could not have resumed on January 1, 1947, or been conducted thereafter.

and his art collection in a second castle, at Dietramszell, Germany, along with art collections of several German museums. When this castle also was requisitioned as an officer billet, the Army discovered the thousands of paintings and shipped them to the Munich Collection Point to permit returning them to their owners upon presentation of proof of ownership. Through this process the Army became agent for the unknown owners, and an express bailment was created. Because these artworks were private property of citizens and museums, under the Hague/Geneva Protocols (*see* ¶ 13, *supra*), the Army was precluded from destroying or confiscating these artworks and had the affirmative duties under that Treaty to return the artworks to their true owners and pay those owners compensation for any military use. (Appendix H at 105a-107a, 99a-100a (§§ 326, 329), 86a (Arts. 46 & 47).)

19. From 1945 until mid-1950 Hoffmann Sr., jailed as a "profiteer," was unable to appear and claim his art collection (although his son Hoffmann Jr. appeared, made claims for paintings that belonged to Hoffmann Jr., and succeeded in having his own paintings released). When the Munich Collection Point was closed in 1949 (while Hoffmann Sr. was still imprisoned), the Army shipped all unclaimed artworks to the Wiesbaden Collection Point to be turned over to the new German civil government, which was to then continue the process of returning the artworks to their owners. In 1950, the Army Historical Division commander toured the Wiesbaden Collection Point and "picked up" the four Watercolors for "addition to the Army's collection." This was a lawful seizure under the Hague/Geneva Protocols by the Army. (¶ 13, *supra*.) It shipped these Watercolors belonging to Hoffmann Sr. to Alexandria, Virginia in 1951, also lawfully, under the Protocols. *Ibid.*

20. The Army has no claim of ownership to the four Watercolors under any theory. Rather, the Army remained merely a lawful possessor of those Watercolors with the same duties under the Hague/Geneva Protocols, Articles 46, 23(g), 53 and

56, (Appendix H at 85a-88a), and the law of agency and bailment that it had as to the Photographs.

21. When Hoffmann Sr. was released from prison in mid-1950, he had no knowledge of what had happened to his art collection, and when he died in 1957, his daughter Henriette von Schirach inherited his four Watercolors. In 1964, she wrote to the Government in Washington (in German) asking whether it had possession of her four Watercolors; the Government replied that it did not have the Watercolors. This too was untrue: the four Watercolors were then in the possession of the Army Historical Division in Alexandria, Virginia.

22. Incident to writing a book about Hitler's paintings, Plaintiff Price (who was dismissed from the case in 1998), read the Army Historical Division's brochure about the four Watercolors and obtained permission to publish photographs of the Watercolors in his book. Price noted that the Army's records showed that it had no knowledge of who owned the Watercolors.

23. In 1982, Price's book research led him to Henriette von Schirach. When Price showed her the photos of the Watercolors held by the Army Historical Division, she discovered for the first time that the Watercolors she had previously questioned the Government about were indeed in the possession of the United States.

24. After making requests for return of the Watercolors, which the Army refused, and then exhausting administrative remedies, Plaintiffs Price and Henriette von Schirach filed an FTCA suit for this 1983 tort that occurred in the United States. The trial court's judgment for Plaintiff Price on this 1983 FTCA claim was reversed by the Fifth Circuit upon its conclusion that the FTCA did not apply to torts committed during the 1940s by the Army in Europe. (*See* ¶ 1, *supra*).

25. In the 1989 suit, Plaintiff Henriette von Schirach claimed that the Watercolors were taken by the Government

from her in the United States, not in Germany, without paying any compensation in violation of the Fifth Amendment. (*See* ¶ 2, *supra*).

## REASONS FOR GRANTING THE PETITION

There are at least three reasons for granting the petition for certiorari in this case:

• The Wrongful Taking Clause decision of the Federal Circuit directly conflicts with this Court's *Russian Volunteer Fleet* decision and the holding of the Second Circuit in *Sardino v. Federal Reserve Bank.* This issue is of enormous importance to nonresident aliens who own billions of dollars worth of property located in the United States.

• Our Government's explicit abrogation of its obligations under the Hague/Geneva Protocols suggests that our Government considers itself able to ignore the treaty agreements it has made, despite U.S. Constitution Article VI. The Hague (IV) Convention itself prescribes that any party violating these Protocols "shall, if the case demands, be liable to pay compensation." Allied armies face worldwide public condemnation for violations of human personal rights and violations of private property rights protected by the Hague/ Geneva Conventions.[14] Our Government and its courts must

14. This is a contemporary problem in the Iraq police action. Under the headline *Retreat on Rules for Wartime Dishonors Core U.S. Values,* USA Today, May 14, 2004 at A.8, reported in a news story that the Geneva Conventions "affirm a bedrock American principle: respect for basic human rights," and set limits on the conduct of war to curtail the "barbarism that has been a hallmark of wars throughout history." The report continues that the Abu Ghraib prison abuses obviously "violated the Geneva Conventions" and caused the Army to promise to place the texts of the Geneva Conventions before both U.S. military personnel and war prisoners.

This cure for the patent Geneva Convention violations at the Abu Ghraib prison is aimed by the Army at the lowest level in the Army's chain of command. The instant *Hoffmann* case requires a cure by this Court aimed at the top of the Army's chain of command. This case

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recognize and enforce these Hague/Geneva Protocols and the Government must "pay compensation" to the persons it injures through a process of intentional violation of the Protocols. Misconduct by the Executive branch – the root of problem – must be and can only be controlled by this Court.

• The Federal Circuit has failed to recognize uncontradicted state supreme court opinions that hold that equitable estoppel trumps a statute of limitations defense raised by a thief in possession of the property he stole when that thief is sued by the owner of the property, particularly when the thief has stated to the property owner that he does not have the property in his possession (¶¶ 2,11,17, and 21, *supra*) and has failed to disclose documents created to attempt to "legalize" the theft. (¶¶ 12, 14, 16, and 17, *supra*). This law is equally applicable in the federal system. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959); *Holmberg v. Armbrecht,* 327 U.S. 392 (1946).

The Government legally seized the privately owned Hoffmann Publishing Company's 2,850,000 Photographs and the four Watercolors (worth in aggregate about $27,500,000) and legally transported them to the United States; its decision not to return these properties is the problem. The Hague/Geneva Protocols governing the conduct of the Army in occupied foreign lands allowed the Army to seize chattels owned by German citizens for the Army's use but precluded both destruction and confiscation of those chattels. Further, under the Hague/Geneva Protocols, when the Army seized privately owned property for use, it was required to return the property and pay compensation. The only exception to the Protocols' no-confiscation rule permits the United States to confiscate property owned by private German citizens that was physically located in the United States

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involves one of thousands of thefts (supposedly eliminated by the Hague/Geneva Conventions) of valuable art and personal property during and after war and police actions. The unique aspect of the *Hoffmann* case is that the culprit is the United States Government itself.

between December 7, 1941 and noon on December 31, 1946. Obviously, that exception is factually inapplicable here.

In the instant case, the Army abrogated these rules of the Hague/Geneva Protocols by lawfully seizing Plaintiffs' privately owned property in Europe in 1950, bringing it to the United States and then confiscating the property in the United States in 1951and thereafter. The Army's 1951 confiscation in the United States of the 615,000 Nürnberg Photographs was effected by using a statutory vesting mechanism that expired five years earlier, at noon December 31, 1946, and did not disclose this confiscation to Hoffmann Jr. until 1989, during the course of this litigation. When requests for return of the balance of the Photographs and Watercolors were made, the Government first denied possession of these properties, and later after it was clear that the Government had the properties, it refused to deliver them to Plaintiffs and thereby confiscated them.

The Federal Circuit has explicitly sanctioned the Government's violations of the Hague/Geneva Protocols by faulting Plaintiffs:–

• for failing to contest, by 1953, entry of a 1951 vesting order, with respect to the Nürnberg Photographs, *statutory authority for which had expired at noon on December 31, 1946*;

• for failing to contest the same vesting order by 1953, that was not disclosed to Plaintiffs until 1989, even though the Army had known Hoffmann Jr.'s mailing address in Germany since 1949;

• for failing to prove that the Government acted as a fiduciary with respect to the four Watercolors when the Army collected these Watercolors along with millions of other artworks from storage places in Europe, for the published explicit and sole purpose of returning same to their lawful owners;

• for failing to file suit within a four year statute of limitations on the Government's illegal action when, pursuant

to overt misrepresentations and equitable estoppel, there was no statute of limitations.

In the process of the foregoing, the Federal Circuit ignored three elemental principles that dictate the outcome of this case:

**First,** a foreign owner of private property "taken" in the United States by the Government has Fifth Amendment rights to claim reasonable compensation because of ownership, without regard to that owner's absence from the United States. The only relevant facts that the foreign owner must establish under the Fifth Amendment are that the Government has taken the owner's property when it was in the United States and has failed to pay reasonable compensation. All of the Photographs and Watercolors were lawfully in the United States, since, pursuant to the Hague/Geneva Protocols, the Army brought those properties to the United States in 1950 and 1951. The "takings" occurred in the United States thereafter.

**Second,** the Government's explicit abrogation of its obligations under the Hague/Geneva Protocols suggests that the Government considers itself above its treaty obligations, despite U.S. Constitution Article VI. If the Government breaches its obligations under the Hague/Geneva Protocols, and then disregards its specific obligation in Article 3 of the Hague Convention to pay compensation, how does it expect United States soldiers to conduct themselves? Plaintiffs clearly have a private right of action against the Government because of its breaches of its obligations under the Hague/Geneva Protocols and the Treaty obligation owed by the Government to pay compensation for the damages it causes by its breaches.

**Third,** as to its statute of limitations conclusions: the illegal confiscation in the United States by the Government of all of the 2,850,000 Photographs and the four Watercolors casts the Government as a thief with respect to these privately-owned properties. These confiscations were fraudulently concealed from the Hoffmann family until discovery in the pending lawsuits forced the Government to disclose the facts after

14 years of litigation. The undisputed law of the United States is that because of equitable estoppel and the fraudulent concealment, no statute of limitations defense can be successful in litigation between the true owner and the thief. Further, lack of a timely contest of the 1951 "vesting order" that was "created" under a statute that ceased to exist at noon on December 31, 1946, is simply a red herring–if the statute itself ceased to exist by President Truman's Proclamation 2714, the "vesting order" is void and of no effect; how can a statute of limitations created under that expired statute start to run in 1951 (which is what the Fifth Circuit held)? How can the statute of limitations in an expired statute even exist, much less be relevant?

## I. THERE IS A CLEAR CONFLICT BETWEEN THE FEDERAL CIRCUIT'S FIFTH AMENDMENT HOLDING AND THE HOLDINGS OF THIS COURT AND THE SECOND CIRCUIT

Hoffmann Jr.'s 615,000 Nürnberg Photographs were lawfully brought to the United States by the Army in late 1950, four years after the noon December 31, 1946 end (pursuant to President Truman's Proclamation) of World War II's TWEA vesting program, and were made the subject of a vesting order in 1951, five years after authority to enter such an order had been terminated by President Truman's Proclamation. By any standard, this 1951 vesting order was void *ab initio* and could have no legal effect.[15] The remaining 2,235,000 Photographs

15. When aliens are citizens *or* residents of a country at war with the United States, under the TWEA they are "enemies," and all "enemies" as defined in the TWEA are denied protection of the Takings Clause of the Fifth Amendment when "during time of war" their property in the United States is seized and forfeited ("vested") by the Government. 50 U.S.C. App. § 5(b), Appendix H at 90a-93a. By its terms, this TWEA forfeiture authority is limited to property physically within the United States during time of war, which ceases on "the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date. . . ." 50 U.S.C. App. § 2, Appendix H at 90a-91a. President Truman's December 31, 1946 (Cont'd)

(that Plaintiffs learned from discovery responses in July 1996 had been in the Army's possession since the 1940s) were never the subject of any vesting order, so the TWEA has no application.

Four Watercolor paintings owned by Hoffmann Sr. and in 1957 inherited by his daughter Henriette were also brought to the United States by the Army in 1951 as Army souvenirs of World War II. The four Watercolors, the 615,000 Nürnberg Photographs, and the 2,235,000 Photographs were all confiscated in the United States without any compensation

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proclamation ended hostilities with Germany at noon that date, permitting resumption of trade between Germans and U.S. persons effective January 1, 1947. See, note 12, *supra.* Consequently, only property physically within the United States after December 7, 1941 and before noon December 31, 1946 belonging to German persons or residents on or before noon December 31, 1946 could be subject to vesting. See, President Truman's letter of July 9, 1951, to the Vice President and Speaker of the House (Appendix H at 94a-95a), describing the history of the World War II vesting program which was begun December 7, 1941 by President Roosevelt's executive order (*Gmo. Niehaus & Co. v. United States*, 170 F. Supp. 419, 421 (Ct. Cl. 1959))(citations omitted, emphasis added):

> [I]t is not intended that the termination of the state of war shall in any way change or alter the program, which Congress has authorized, seizing under the Trading with the Enemy Act, *German property in this country on or before December 31, 1946*. . . . The vesting of German property under this program does not extend to property acquired since the resumption of trade with Germany on January 1, 1947, following the cessation of hostilities. *It is limited to German property and rights located here before or during the period of hostilities.*

*Accord, Cities Serv. Co. v. McGrath*, 342 U.S. 330 (1952); *Silesian Am. Corp v. Clark,* 332 U.S. 469, 475-476 (1947); *Gmo. Niehaus & Co. v. United States*, 373 F.2d 944 (Ct. Cl. 1967); *N.V. Handelsbureau La Mola v. Kennedy*, 299 F.2d 923, 926-927 (D.C. Cir. 1962); *Rogers v. Smith*, 185 F. Supp. 401 (S.D. Ill. 1960); *McGrath v. Agency of Chartered Bank*, 104 F. Supp. 964 (S.D.N.Y. 1952), *aff'd sub nom. McGranery v. Agency of Chartered Bank*, 201 F.2d 368 (2d Cir. 1953).

ever being paid to the Plaintiff/owners, in violation of the Fifth Amendment Wrongful Taking clause.

The Fifth Amendment's Wrongful Taking clause reads "Nor shall any person be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Despite the admonitions in *Reid v. Covert,* 354 U.S. 1, 14 (1957), against reading exceptions into the Constitution's protection against arbitrary government, the district court held that Plaintiffs, as nonresident aliens whose contact with the United States was having approximately $27,000,000 of their property legally brought here by the Government, have no Wrongful Taking rights under the Fifth Amendment. (Appendix F at 55a). The Federal Circuit affirmed. (Appendix E, at 37a). This Court established otherwise 73 years ago in *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489-92 (1931).

*Russian Volunteer Fleet* arose in the aftermath of World War I. The United States government had nationalized ships under construction in New York that belonged to Russian Volunteer Fleet corporation. The only contact this alien corporation ever had with the United States was that it owned property (vessels under construction) in the United States. This Court concluded (*id.* at 489):

> [T]he petitioner is a corporation duly organized under the laws of Russia. . . . There was no legislation which prevented it from acquiring and holding the property in question. The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. [Citations omitted]. Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. . . .

*Accord, United States v. Pink*, 315 U.S. 203 (1942).

Except for the Federal Circuit's decision in the instant case, the Fifth Amendment's Wrongful Taking provision has been viewed as applicable to citizens and foreigners alike when they own property located within the United States. As the Second Circuit stated (*Sardino v. Federal Reserve Bank*, 361 F.2d 106, 111 (1966)(citations omitted)):

> The Government's second answer that "The Constitution of the United States confers no rights on non-resident aliens" is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders–and even to some without. This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing they were protected by constitutional guarantees; today for other reasons, we are still eager to attract foreign funds. In *Russian Volunteer Fleet v. United States*, the Court squarely held that an alien friend is entitled to the protection of the Fifth Amendment's prohibition of taking without just compensation–even when his government is no longer recognized by this country. And the Court has declared unequivocally, with respect to non-resident aliens owning property within the United States, that they "as well as citizens are entitled to the protection of the Fifth Amendment."

The law applicable to Plaintiffs is as stated in *Russian Volunteer Fleet* and *Sardino*: Except in wartime (*see* note 15, *supra*), nonresident friendly aliens' property located in the United States is protected by the Fifth Amendment Wrongful Taking clause. *Accord*, *Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952); *see also N.V. Handelsbureau La Mola v. Kennedy*, 299 F.2d 923, 926-927 (D.C. Cir. 1962); *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 200-01 (D.C.

Cir. 2001) (held, in reviewing Secretary of State's order designating Iranian dissident organization as a "foreign terrorist organization," organization's ownership of bank accounts in the United States were "substantial connections" and under *Russian Volunteer Fleet,* organization is entitled to Fifth Amendment protection); *Ashkir v. United States*, 46 Fed. Cl. 438, 444 (2000) (held, foreign ownership of United States-situs property by itself triggers application of the Takings Clause under *Russian Volunteer Fleet*; the court noted (citing *Nitol v. United States*, 7 Cl. Ct. 405, 415 (1985)), that cases have even applied the Takings Clause to property owned by foreigners located in United States trust territories).

The lower courts viewed *Russian Volunteer Fleet* as being limited by *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *Eisentrager* is not a Fifth Amendment United States-situs property case but rather a *habeas corpus* case that arose in China.[16] This Court denied the existence of any constitutional right to *habeas corpus* in Germany for these German soldiers, recognizing that constitutional rights and privileges *normally accorded* to resident or nonresident aliens *must give way to national security in times of war* (339 U.S. at 776, 785). In reaching this conclusion, this Court explicitly limited its opinion to "enemies," noting: "[the] disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage." *Eisentrager*, 339 U.S. at 772.[17]

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16. German soldiers who were fighting with the Japanese against the Allies in China during 1945 (after Germany surrendered) were convicted of war crimes in China and were transported to Germany to serve their sentences. From their incarceration in Germany they petitioned the D.C. District Court for *habeas corpus*.

17. *Verdugo-Urquidez* involved the seizures in Mexico of contraband, instrumentalities of crime, and evidence of crime in a warrantless search; the evidence was later used in a prosecution in the (Cont'd)

The issue in the instant case is a property issue, not a personal rights issue, and Plaintiffs' properties had the only contact with the United States necessary as to property: physical presence of that property in the United States. Plaintiffs' properties, worth about $27,000,000, were lawfully brought into the United States by the Army, and were then confiscated by the Government in the United States with no compensation being paid. It is preposterous to suggest that the Plaintiffs must do anything more to "come within the territory of the United States and develop substantial connections with this country" before

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United States. In a Fourth Amendment suppression of evidence context this Court remarked (494 U.S. at 275):

> Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such [extraterritorial] American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.

Clearly, the "searches and seizures" language in this text refers to warrantless searches outside the United States, but that language also has application in the instant case, where the Hague/Geneva Protocols prohibit the victors in a war from plundering private property, but permit the victors to seize and use private property owned by enemy citizens both overseas and within the United States, provided that the property is returned and compensation paid. See, Appendix H at 107a-116a. In the instant case the Government has done exactly what the Hague/Geneva Protocols prohibit: the Government has failed to return the seized property and pay compensation for use and can find no shield in *Verdugo-Urquidez*. The *Verdugo-Urquidez* opinion, like the opinion in *Eisentrager*, is an explanation of the Court's *Russian Volunteer Fleet* holding, not an limitation on that holding and it supports the concept that a foreigner who is injured by the U.S. Army conduct in violation of the Hague/Geneva Protocols has a right of action for that injury.

suing the Government for taking their $27,000,000 of property lawfully brought into the United States by the Government itself. Plaintiffs were not "enemies" either when the Government brought their properties into the United States or at the time of the confiscations of those properties.

At all relevant times, Plaintiffs were friendly aliens with substantially all of their properties lawfully within the United States in the possession of the Government. *See Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952). Under *Guessefeldt* and *Russian Volunteer Fleet*, Plaintiffs are entitled to compensation under the Fifth Amendment for the taking of their properties by the Government without compensation.

## II. VIOLATION OF THE HAGUE/GENEVA PROTOCOLS BY THE ARMY CREATES A PRIVATE RIGHT OF ACTION FOR THE INJURED PLAINTIFFS

Article 46 of the Hague/Geneva Protocols (Appendix H at 86a) mandates that private property must be respected and cannot be confiscated. This provision, as a treaty, is as much the law of the United States as a statute enacted by Congress. U.S. Const., Art. VI; *Valentine v. United States*, 299 U.S. 5,10 (1936). Existence of a private right of action under a treaty is dependent upon whether the treaty is "self-executing," a doctrine derived from *Foster v. Neilson*, 27 U.S. 253, 314-315 (1829), *overruled on other grounds*, *United States v. Percheman*, 32 U.S. 51 (1833). Chief Justice Marshall, writing for the Court in *Foster*, held (*id.* at 314):

> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and

> the legislature must execute the contract before it can become a rule for the Court.

The Hague Convention Respecting the Laws and Customs of War on Land, to which the Hague/Geneva Protocols are attached, however, specifically provides that compensation is owed by a party to the Convention who violates the Hague/Geneva Protocols and in doing so causes damages (*id.*, art. 3, Appendix H at 89a):

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

This is a clear directive that Plaintiffs in the instant case have a right of action under the Hague/Geneva Protocols for the confiscation of their Photographs and Watercolors (an act forbidden by those Protocols), and that the Government is financially responsible to the injured Plaintiffs for these violations of their private property rights protected by the Hague/Geneva Protocols.[18]

There is no immunity for war crimes: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [breaches]." Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 75 U.N.T.S. 287, art. 148. Moreover, this convention at article 146 requires all parties to enforce its requirements by "enact[ing] any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed" any breach of the treaty. This language

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18. This Court has recently declined to address this issue in the context of military detainees, *Hamdi v. Rumsfeld*, No. 03-6696 at 27 n.2 (Slip Op., June 28, 2004), as the Court held that the Constitution mandated certain procedural due process guaranties to Iraqi war detainees. *But cf. Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984).

implies that any financial recompense is self-executing, as the "to be enacted" legislation, "if necessary" is penal in nature.[19]

For these reasons, in addition to their rights under the Fifth Amendment,[20] Plaintiffs have a right of action for monetary recompense from the Government for its violation of property rights protected by the Hague/Geneva Protocols.[21]

## III. THE COURTS BELOW IGNORED EQUITABLE ESTOPPEL AND THUS WRONGFULLY SUSTAINED A STATUTE OF LIMITATIONS DEFENSE IN A SUIT BY A PROPERTY OWNER AGAINST THE THIEF IN POSSESSION OF THE STOLEN PROPERTY

This issue deals with the 2,850,000 Photographs taken under control pursuant to the Hague/Geneva Protocols by the Army from the Hoffmann Publishing Company's storage sites, (Appendix H at 116a-117a), then seized pursuant to these Protocols for various military purposes in Europe during the aftermath of World War II (Appendix H at 107a-116a), and later

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19. In 1996 and 1997 Congress enacted the *War Crimes Act of 1996*, 18 U.S.C. § 2441, amended by *The Foreign Operations, Export Financing, and Related Programs Appropriations Act*, 1998, Pub. L. No. 105-118, Title V, § 583 (1997), which execute the Geneva Convention in the sense of providing criminal penalties for specific violations. These acts do not purport to address civil liability.

20. Because of the proliferation of implied rights of action in private law in the United States, the Court, in *Cort v. Ash*, 422 U.S. 66, 78 (1975) listed four questions for courts to answer to decide whether a particular statute created a private right of action. Under the *Cort* standards, violations of the provisions in the Hague/Geneva Protocols dealing with confiscation, seizure, control, and requisition, which are all aimed at protecting personal property of civilians in occupied territories (Appendix H at 105a-117a), would clearly create private rights of action. Moreover, the Court's *Verdugo-Urquidez* decision supports granting Plaintiffs a right of action against the Government for Hague/ Geneva Protocol violations. See, note 17, *supra*.

21. This issue was argued in the courts below but was never reached by any court.

transported to the United States for further use pursuant to the same Treaty. Hoffmann Jr. knew that his 615,000 Nürnberg Photographs (worth about $7,000,000) had been seized and taken to the United States in 1951 for uses permitted by the Hague/Geneva Protocols, objected to the taking, but was assured that these Photographs would be returned to him after the Army's use in the United States was concluded.[22] The Hoffmann family learned from long-withheld discovery responses filed in July 1996 that the Army also had seized and transported an additional 2,235,000 Photographs belonging to Hoffmann, Jr. (worth about $20,000,000) to the United States in the late 1940s.

The DDC, in its 2003 ruling on the Government's motion for summary judgment, held that "the statute of limitations starts running when a putative plaintiff, deprived of property by fraud or theft, knows or should know that the putative defendant possesses the property and intends to retain it." Based on that incorrect standard, that court held that limitations against Plaintiffs commenced in June 1949, the date Hoffmann Jr. wrote a letter to the Army protesting the announced removal pursuant to the Hague/Geneva Protocols to the United States of his 615,000 Nürnberg Photographs.[23] The Federal Circuit affirmed.

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22. Pursuant to the Hague/Geneva Protocols, seizures of the Photographs and watercolors in Germany in 1950 started no statute of limitations. Under that Treaty, such seizures are lawful and are accompanied by duties of accounting for and returning the chattels seized. (See Appendix H at 107a-116a.) The seizures justify and allow possession for as long as the Government desires to use the chattels. This lawful possession continues until the the chattels are returned to the owner.

23. This is a summary judgment case. As such, the courts below incorrectly concluded that Hoffmann Jr.'s reference to his "entire archive" in his letter of protest concerning the Government's taking of his Nürnberg Photographs to the United States meant that he was aware that the Government also had his other Photographs. This is not a fact, and the evidence does not support that conclusion, particularly in the summary judgment context where the appropriate questions could have been asked Hoffmann Jr. when he was alive, had the Government timely submitted to discovery. See note 24, *infra*.

Both courts below applied an incorrect standard. First, the seizures under the Hague/Geneva Protocols are accompanied by obligations to return the seized properties and pay compensation for the Army's use. Second, when the Government takes the step to confiscate the seized properties (an act that is forbidden by the Hague/Geneva Protocols), it becomes a thief. Consequently, equitable estoppel precludes any statute of limitations defense when the owner of the stolen chattels sues the thief who is still in possession of that stolen property and the thief has made fraudulent misrepresentations to the property owner.[24] The district court, sitting as a court of equity, must apply equitable estoppel to preclude the statute of limitations defense. As this Court stated (*Glus v. Brooklyn E. Dist. Terminal,* 359 U.S. 231, 232-233 (1959)):

> To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle [equitable estoppel] has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.

Because of equitable estoppel,[25] a thief of chattels is precluded from successfully claiming the legal defense of limitations. *Erbe v. Lincoln Rochester Trust Co.*, 13 App. Div. 2d 211, 214 N.Y.S.2d 849, 852 (1961); *Clarke v. Gilmore*, 149 App. Div.

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24. Hoffmann Jr. was told that the 615,000 Photographs would be returned after the Army's writing books about World War II was concluded in the United States (Statement of Facts ¶ 12), that the Government only had these 615,000 Photographs (Statement of Facts ¶ 17) and had none of the Watercolors (Statement of Facts ¶ 21).

25. Sometimes this is referred to as the doctrine of fraudulent concealment: a defendant who by deceit or fraud prevents a potential plaintiff from learning of a cause of action cannot take advantage of his wrongdoing by raising the statute of limitations. *E.g., Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990).

445, 133 N.Y.S. 1047 (1912); *Dodds v. McColgan*, 229 App. Div. 273, 241 N.Y.S. 584 (1930); *Safrin v. Friedman*, 27 Misc. 2d 687, 96 N.Y.S.2d 627 (1950); *General Stencils, Inc. v. Chiappa*, 272 N.Y.S.2d 337, 339, 219 N.E.2d 169, 171 (1966); *Howard v. West Jersey & Seashore Ry.*, 102 N.J. Eq. 517, 141 A. 755 (1928); *Clark v. Augustine*, 62 N.J. Eq. 689, 51 A. 68 (1902); *see Petito v. Piffath*, 623 N.Y.S.2d 520, 522, 647 N.E.2d 732, 734 (1994); *see also Clark v. United States*, 481 F. Supp. 1086, 1095 (S.D.N.Y. 1979), *appeal dismissed*, 624 F.2d 3 (2d Cir. 1980); 3 WM. BLACKSTONE, COMMENTARIES § 145; discussion in HAWKLAND, UNIFORM COMMERCIAL CODE SERIES §§ 2-403:01, 2-403:05 (1999).[26]

Litigation in this case has gone on for more than 21 years, and still the courts below ignore that equitable estoppel applies

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26. It is only when the thief sells the stolen property to a bona fide purchaser for value ("BFP") and delivers the stolen property to this BFP does the statute of limitations become relevant in a suit by the owner of the stolen property against the BFP. Then, a statute of limitations starts to run when the owner finds the BFP in possession of the stolen property, makes a demand on the BFP for return of the property, and the BFP refuses. The landmark holding establishing this point is *Solomon R. Guggenheim Found. v. Lubell*, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991). Until demand for return is made and refused, possession of the stolen property by the BFP is not considered wrongful. *See, e.g., Gillet v. Roberts*, 57 N.Y. 28, 30-31 (1874); *Menzel v. List*, 49 Misc. 2d 300, 304-305, 267 N.Y.S.2d 804 (1966), *modified on other grounds*, 28 App.Div. 516, 279 N.Y.S.2d 608 (1967), *modification rev'd*, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969).

Further, the equitable issue of laches cannot be involved when the owner demands that the BFP return the stolen property and the BFP refuses. The only relevant issues are demand and refusal, and it is only the refusal to return the property that starts the statute of limitations on the true owner's suit against the BFP in that kind of case. *Solomon R. Guggenheim Found. v. Lubell, supra*; *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982); *Mucha v. King*, 792 F.2d 602 (7th Cir. 1986); *see also, Menzel v. List, supra*; *O'Keeffe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980).

when the thief in possession of the property he stole is sued by the property owner. Although the Government's misrepresentations about having any of the 2,235,000 Photographs and the Watercolors and its failure to disclose the 1951 vesting order to Hoffmann Jr. until 1989, coupled with the Government's extensive efforts to avoid discovery, confirm its own knowledge of its duplicitous behavior, the courts below have allowed to Government to escape liability by failing to consider that equitable estoppel precludes any limitations defense in this case.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to the Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED MAY 4, 2004**

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

03-1596

ROBERT H. HOFFMANN, HEIDEMARIE KRUGER, and The Estate of HENRIETTE HOFFMAN VON SCHIRACH, KLAUS VON SCHIRACH, Executor, and SUSANNE HUSTADT (deceased),

Plaintiffs-Appellants,

v.

UNITED STATES and JOHN D. ASHCROFT, Attorney General of the United States,

Defendants-Appellees.

**JUDGMENT**

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|---|---|
| **ON APPEAL from the** | UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA |
| **In CASE NO(S).** | 98-CV-0857 |

*Appendix A*

**This CAUSE having been heard and considered, it is**

**ORDERED and ADJUDGED:**

PER CURIAM (LOURIE, SCHALL, and DYK, *Circuit Judges*):

AFFIRMED. *See* Fed. Cir. R. 36.

**ENTERED BY ORDER OF THE COURT**
s/ Jan Horbaly
JAN HORBALY

DATED MAY -4 2004

## APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED MAY 30, 2003

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

Civil Action 98-0857(HHK)

ROBERT H. HOFFMANN, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

**MEMORANDUM OPINION AND ORDER**

Plaintiffs, German citizens, filed this action against the United States and the Attorney General of the United States in 1989, seeking to recover photographic archives and paintings formerly belonging to Heinrich Hoffmann, Sr. After fourteen years of litigation, only plaintiffs' claim for an implied-in-fact contract of bailment with respect to the non-vested portion of the photographic archive remains.

Before this court are: (1) plaintiffs' motion for leave to file an amended consolidated complaint [# 36]; (2) plaintiffs' motion to transfer this case, in whole or in part, to the Court of Federal Claims [# 39]; (3) plaintiff's motion for

reconsideration of the court's June 28, 1999, decision [# 47]; (4) defendants' renewed motion for summary judgment [# 4]; (5) defendants' motion for a protective order staying all discovery [# 43]; and (6) plaintiffs' motion to compel, pursuant to Fed.R.Civ.P. 37 [# 54]. Upon consideration of these motions, the oppositions thereto, and the record of this case, the court concludes that plaintiffs' motions must be denied, defendants' motion for a protective order must be denied as moot, and defendants' renewed motion for summary judgment must be granted.

## I. BACKGROUND INFORMATION

### A. Factual Background

The case grows out of plaintiffs' efforts to obtain the return of, or compensation for, various property, owned or compiled by Heinrich Hoffmann Sr. ("Hoffmann Sr.") and his son, Heinrich Hoffmann Jr. ("Hoffmann Jr.").[1] Hoffmann Sr. and Hoffmann Jr. are both deceased. Plaintiffs are the heirs of Heinrich Hoffmann, Jr. (Robert H. Hoffmann, Heidemarie Krüger, Susanne Hustädt) and the Estate of Henriette von Schirach, Dr. Klaus V. Schirach, Executor.

Plaintiffs initially filed this lawsuit seeking the return of, or compensation for: (1) four watercolors painted by Adolph Hitler; (2) a photographic archive compiled by

1. Those seeking a more complete factual summary are referred to the prior decision of this court, *Hoffmann v. United States*, 53 F.Supp.2d 483 (D.D.C.1999), *aff'd in part, rev'd in part*, 2001 WL 931588 (Fed. Cir. Aug. 16, 2001).

Hoffmann Sr. and his son, Hoffmann Jr., part of which officially vested in the possession of the United States in 1951 and part of which did not; and (3) the "Time-Life archive," a photographic archive given to the United States in the early 1980's by Time-Life, Inc. Plaintiffs' claims to the watercolor paintings, the vested portion of the photographic archive, and the Time-Life archive have been extinguished by prior rulings of this and other courts. Plaintiffs' only surviving claim is for the non-vested portion of a photographic archive compiled by Hoffmann Sr. That claim will be explored in much greater detail below.

**B. Procedural Background**

This case has had a long and complicated past. Plaintiffs in the present case, together with Texas businessman Billy F. Price, initially filed suit in the Southern District of Texas in 1983. In 1989, the United States District Court for the Southern District of Texas entered partial summary judgment on the issue of liability in plaintiffs' favor. *Price v. United States,* 707 F.Supp. 1465 (S.D.Tex.1989). On appeal, the Fifth Circuit reversed and remanded for entry of judgment of dismissal with prejudice as to certain claims and without prejudice as to others. *Price v. United States,* 69 F.3d 46, 54 (5th Cir.1995). On petition for rehearing, the Fifth Circuit held that its dismissal was also without prejudice with respect to the archives not covered by the vesting order. *Price v. United States,* 81 F.3d 520 (5th Cir.1996).

The instant case was consolidated in the Southern District of Texas on October 2, 1997, from two actions filed by the same plaintiffs, in 1997 and 1989. On March 24, 1998, Billy

F. Price was dismissed as a plaintiff, and the case was transferred to the United States District Court for the District of Columbia. In a memorandum opinion docketed June 28, 1999, this court rejected plaintiffs' claims based on theories of implied-in-fact contract (bailment), Fifth Amendment takings, and tortious conversion and granted defendants' motion for summary judgment with respect to all claims except for those relating to the Time-Life archive. *Hoffmann v. United States,* 53 F.Supp.2d 483 (D.D.C.1999). After relinquishing their Time-Life archive claim, plaintiffs filed an interlocutory appeal, challenging this court's adverse judgment. *See* Notice of Filing, Sept. 10, 1999. On appeal, the United States Court of Appeals for the Federal Circuit affirmed this court's decision in part, but vacated the grant of summary judgment insofar as it related to plaintiffs' implied-in-fact bailment claim with respect to the non-vested portion of the photographic archive. *Hoffmann v. United States,* 2001 WL 931588 (Fed. Cir. Aug. 16, 2001). This case is before this court on remand; plaintiffs' bailment claim for the non-vested portion of the photographic archive concerns us here.

On remand, plaintiffs have not sat idly by, however. They have filed a number of motions requiring the court's attention. In this memorandum opinion, the court will address the following: (1) plaintiffs' motion for leave to file an amended consolidated complaint; (2) plaintiffs' motion to transfer this case, in whole or in part, to the Court of Federal Claims; (3) plaintiff's motion for reconsideration of the court's June 28, 1999, decision holding that non-resident friendly aliens are not entitled to the protections of the Fifth Amendment; (4) defendants' renewed motion for summary

judgment; (5) defendants' motion for a protective order; and (6) plaintiffs' motion to compel. The court will explore each matter in turn.

## II. ANALYSIS

### A. Plaintiff's Motion for Leave to File an Amended Consolidated Complaint

The court will first address plaintiffs' motion for leave to file an amended consolidated complaint. Plaintiffs seek to amend their complaint: (1) to increase their damage claim for the non-vested portion of the photographic archive from $9,000 to $73,000,000 because, plaintiffs claim, there are more non-vested photographs than they originally thought, and so their damages are far greater than they originally claimed; (2) to raise the Hague Treaty as an additional basis of recovery; and (3) to "restate everything that was in the case from the beginning, . . . all in one pleading so that anyone new to the case can ascertain everything necessary in one place." Pls.' Reply at 2.[2]

Defendants oppose this motion, arguing that plaintiffs' amended consolidated complaint "offers no new claims and, instead, seeks to relitigate issues already finally decided." Defs.' Opp'n to Pls.' Mot. for Leave to File at 1. In addition, according to defendants, the motion "is one more desperate effort to inject additional issues [into the case] to keep the litigation alive despite the solid defenses defendants have

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2. Aside from Fed.R.Civ.P. 15, plaintiffs offer no authority in support of their proposed amendment.

raised and which the Federal Circuit has suggested this Court rule upon." *Id.* at 5-6.

A party seeking to amend her complaint a second time may do so only by leave of the court or by written consent of the adverse party. Fed.R.Civ.P. 15(a). A decision to grant such leave is within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Doe v. McMillan*, 566 F.2d 713, 720 (D.C.Cir.1977). Leave is to be freely given, however, and if a court denies a plaintiff's motion for leave to amend, the court must provide a sufficiently compelling reason for the denial. Adequate reasons are: undue delay, undue prejudice to the non-moving party, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, or futility of amendment. *See Foman*, 371 U.S. at 182; *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C.Cir.1996); *Pharm. Research & Mfrs. of Am. v. Scully*, 2003 WL 1701416, *13 (D.D.C. Mar. 28, 2003).

In this case, the court concludes that plaintiffs' motion for leave to file an amended consolidated complaint must be denied because: (1) there has been undue delay; (2) the amendment would unduly prejudice defendants; and (3) plaintiffs' conduct raises the spectre of bad faith.

**1. Undue Delay**

Plaintiffs have litigated this action, in one form or another, for nearly twenty years. The case has made its way

though two different district courts,[3] three appellate proceedings,[4] two appellate rehearings,[5] two unsuccessful certiorari petitions,[6] and is now on remand from the Federal Circuit. Plaintiffs have been afforded ample opportunity to advance their best arguments. Nevertheless, plaintiffs did not file the instant motion for leave to file an amended, consolidated complaint until July 9, 2002-although plaintiffs concede that they had at their disposal all the facts necessary to raise the claims raised for the first time here by 1997, at the latest. *See* Pls.' Reply to Defs.' Opp'n to Pls.' Mot. for Leave to File at 1. Under these circumstances, the court finds that there has been undue delay, militating in favor of a denial of plaintiffs' motion.

Other courts have reached this same conclusion when faced with delays far shorter in duration. *See, e.g., Atchinson v. Dist. of Columbia,* 73 F.3d 418, 427 (D.C.Cir.1996) (affirming district court's denial of leave to amend because, *inter alia,* the litigation had been pending for nearly two years when the motion to amend was filed); *Doe,* 566 F.2d at 720

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3. *Hoffmann v. United States,* 53 F.Supp.2d 483 (D.D.C.1999); *Price v. United States,* 707 F.Supp. 1456 (S.D.Tex.1989).

4. *Hoffmann v. United States,* 2001 WL 931588 (Fed. Cir. Aug. 16, 2001); *Price v. United States,* 81 F.3d 520 (5th Cir.1996); *Price v. United States,* 69 F.3d 46 (5th Cir.1995).

5. *Hoffmann v. United States,* 2001 WL 1564005 (Fed. Cir. Nov. 6, 2001); *Price v. United States,* 81 F.3d 520 (5th Cir.1996).

6. *Hoffmann v. United States,* 535 U.S. 1112 (2002); *Price v. United States,* 519 U.S. 927 (1996).

(affirming district court's decision to deny the plaintiff's motion to amend the complaint because the motion was filed more than three years after the commencement of litigation); *Komie v. Buehler Corp.*, 449 F.2d 644, 648 (9th Cir.1971) (affirming district court's decision to deny the plaintiff's motion to amend the complaint because "[t]he motion was made 31 months after the answer was filed"), *Mittleman v. United States,* 997 F.Supp. 1, 10 (D.D.C.1998), *aff'd sub nom., Mittleman v. King,* 1998 WL 796300 (D.C.Cir. Oct.15, 1998) ("Plaintiff's recent discovery of a new fact supporting this cause of action does not mitigate the extreme delay in her request to amend her complaint-a delay of almost ten years.").

**2. Undue Prejudice**

The court next finds that allowing plaintiffs to amend their complaint would unduly prejudice defendants. Currently, there is only one relatively narrow issue pending in this case. *See Hoffmann v. United States,* 2001 WL 1564005, *1 (Fed. Cir. Nov. 6, 2001), *denying petition for reh'g,* ("The only claim that plaintiffs-appellants [may] assert on remand is their claim of an implied-in-fact bailment with respect to the 'non-vested portion of the [photographic] archive.' "). Moreover, assuming plaintiffs' motion is denied, that one issue may be resolved by defendants' renewed motion for summary judgment, currently pending before this court. If the court were to grant plaintiffs' motion, however, the resolution of this already-protracted litigation would be significantly delayed. At least part of this case would need to be dismissed or transferred to the Court of Federal Claims, and further discovery might even be required. Such an

amendment, therefore, would subject defendants to clear and significant prejudice.

This prejudice counsels in favor of a denial of plaintiffs' motion. *See, e.g., City of Williams v. Dombeck,* 203 F.R.D. 10, 11-12 (D.D.C.2001) (denying a motion to amend after citing similar considerations); *accord Wilderness Soc'y v. Griles,* 824 F.2d 4, 19 (D.C.Cir.1987) (affirming district court's denial of plaintiff's motion to amend where the motion was filed more than a year after the inception of litigation and dispositive motions had been filed and opposed); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.,* 810 F.2d 243, 247-48 (D.C.Cir.1987) (finding the district court's denial of the motion for leave to amend was "fully warranted" where the case was before the district court on remand, the motion to amend was filed years after the plaintiff had filed its initial complaint, and the district court had determined that the amendment would significantly delay the litigation's resolution).

**3. Bad Faith**

Finally, it is fairly well established that "[d]enying leave to amend is particularly appropriate when a lawsuit is on the verge of final resolution." *Wardell v. City of Chicago,* 2001 WL 849536, *4 (N.D.Ill.2001). A plaintiff, quite simply, cannot be permitted to "circumvent the effects of summary judgment by amending the complaint every time a termination of the action threatens." *Glesenkamp v. Nationwide Mutual Ins. Co.,* 71 F.R.D. 1, 4 (N.D.Cal.1974), *aff'd per curiam,* 540 F.2d 458 (9th Cir.1976); *accord Local 472 of United Ass'n of Journeymen & Apprentices v. Georgia*

*Power Co.*, 684 F.2d 721, 724-25 (11th Cir.1982) (no abuse of discretion to deny motion to amend that "appears to be nothing more than an effort to avoid an adverse summary judgment ruling").

In the instant action, plaintiffs' motion appears to be nothing more than an unfortunate attempt to "muddy the waters," to divert the court's attention from the resolution of defendants' dispositive motion, which, as noted above, is ripe and currently before this court. After all, by their own admission, plaintiffs had in their possession all the facts necessary to amend their complaint by 1997, but plaintiffs, without any explanation for the delay, advance the claims here for the first time. Such behavior raises the spectre of bad faith. The court is especially suspicious of plaintiffs' motion in light of the Federal Circuit's clear admonition to plaintiffs, concerning the scope of permissible argument before this court[7] It appears to this court, then, that plaintiffs,

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7. The Federal Circuit, perhaps sensing that plaintiffs may seek to prolong this already-protracted litigation, provided:

> [P]laintiffs-appellants are not free to assert on remand 'all arguments previously made' with respect to the 'non-vested portion of the [photographic] archive.' In view of our August 16 decision and our denial today of plaintiffs-appellants' petition for rehearing, plaintiffs-appellants are limited in terms of the arguments they may make on remand. The only claim that plaintiffs-appellants may assert on remand is their claim of an implied-in-fact contract of bailment with respect to the 'non-vested portion of the [photographic] archive'. . . . If the district court rules in the government's favor on

(Cont'd)

sensing the end is near,[8] are attempting to resuscitate previously-rejected claims, in order to breathe life into this withering lawsuit. The court refuses to countenance such conduct. *See Key Airlines, Inc. v. Nat'l Mediation Bd.*, 745 F.Supp. 749, 752 (D.D.C.1990) (refusing to grant leave to amend the complaint because the plaintiff had acted in bad faith by withholding a claim until a very late stage in the litigation).[9]

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(Cont'd)

> its statute of limitations defense, or if it rules in the government's favor on any other dispositive defense that, consistent with this opinion, is properly before it, then the case will be over, subject, of course, to any appeal of plaintiffs-appellants.

*Hoffmann v. United States*, 2001 WL 1564005, *1 (Fed. Cir. Nov. 6, 2001) (denying petition for rehearing).

8. In so finding, the court notes that the Federal Circuit has openly suggested that the Government's statute of limitations argument has merit. *Hoffmann*, 17 Fed.Appx. at 989-90. Plaintiffs are clearly mindful of that court's dim view of their current claims.

9. The spectre of bad faith is additionally raised by the *content* of the amended consolidated complaint. As defendants amply demonstrate, in the proposed complaint, plaintiffs seek to relitigate claims which this and other courts have already resolved. For instance, plaintiffs' proposed amended consolidated complaint names Billy F. Price as a party to the action, Am. Consolidated Compl. ¶ 1, although Mr. Price was dismissed from this lawsuit years ago. *See* Transfer Order, Mar. 24, 1998 (Hughes, J.) (dismissing Price as a plaintiff); *Hoffmann*, 2001 WL 931588, *4 (refusing to review the United States District Court for the Southern District of Texas' decision to dismiss

(Cont'd)

For the forgoing reasons, the Court concludes that plaintiffs' motion for leave to file an amended consolidated complaint must be denied.

## B. Motion to Transfer

The court now turns to plaintiffs' motion to transfer this case, in whole or in part, to the Court of Federal Claims.

### 1. Motion to Strike

Before the court can address the merits of plaintiffs' motion, the court must address one preliminary matter: defendant's motion to strike plaintiffs' supplement to their motion to transfer the case in whole or in part to the Court of Federal Claims. Defendants contend that plaintiffs' supplemental motion should be stricken because it is "not material to any matter pending before the Court." Def.'s Motion to Strike at 1.[10] Plaintiffs oppose defendants'

(Cont'd)

Price from this action), *cert denied,* 535 U.S. 1112 (2002). *Cf. Polsby v. Thompson,* 201 F.Supp.2d 45, 51 (D.D.C.2002) (noting that a motion to amend may be denied if the amended complaint "merely restates the same facts as the original complaint in different terms [or], reasserts a claim on which the court previously ruled") (quoting 3 Moore's Federal Practice § 15.15[3] ) (3d ed.2000). The content of plaintiffs' consolidated amended complaint further demonstrates why plaintiffs' motion must be denied.

10. In plaintiffs' supplement, plaintiffs contend that "any United States citizen who has claims against the Republic of Germany, similar to the claims made against the United States Government in this case,

(Cont'd)

motion, insisting that their supplemental motion is, in fact, relevant.

While the relevance of plaintiffs' supplemental motion does appear somewhat obscure, defendants fail to cite any authority to support the proposition that a motion may be stricken for lack of relevance. *See* LCvR 7.1(a) ("Each motion shall include or be accompanied by a statement of the specific points of law and authority that support the motion. . . ."); *accord Flynn v. Thibodeaux Masonry, Inc.*, 2002 WL 31520354, *2 (D.D.C. Oct.28, 2002). Accordingly, defendants' motion to strike plaintiffs' supplement is denied, and plaintiffs' supplemental motion shall be considered.

**2. Plaintiffs' Motion to Transfer**

The court now turns to the merits of plaintiffs' motion to transfer this case, in whole or in part, to the Court of Federal Claims. Upon consideration of this motion, defendants' opposition thereto, and the record of this case, the court concludes that plaintiffs' motion must be denied.

Plaintiffs ask this court to transfer this action to the Court of Federal Claims, pursuant to 28 U.S.C. § 1631. This section provides:

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(Cont'd)
has the right to freely prosecute such claims against the Government of Germany in German courts." Pls.' Supp. at 1 (citing Decl. Klaus Reuther). Plaintiffs argue that "the foregoing is a jurisdictional precondition to the exercise by the Court of Federal Claims of jurisdiction in this case." *Id.*

*Appendix B*

> Whenever a civil action is filed in a court as defined in section 610 of this title . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed. . . .

28 U.S.C. § 1631 (1982).

In filing this transfer motion, plaintiffs apparently assumed that the court would grant their motion for leave to file an amended consolidated complaint. Had the court done so, because the amended consolidated complaint included a request for damages in excess of $10,000, and such claims are within the exclusive jurisdiction of the Court of Claims, this court would have been without jurisdiction to consider plaintiffs' claim for monetary relief. *Waters v. Rumsfeld,* 320 F.3d 265, 270 (D.C.Cir.2003) ("Under the (Big) Tucker Act, claims 'exceeding the $10,000 jurisdictional ceiling . . . are within the exclusive jurisdiction of the Court of Claims.' ") (quoting *Goble v. Marsh,* 684 F.2d 12, 15 (D.C.Cir.1982)).

Plaintiffs' motion for leave to amend was denied, however. Thus, plaintiffs' claim for monetary damages is limited to $9,000 for the non-vested portion of the archive. Because plaintiffs' claim is for less than $10,000, jurisdiction in this court is proper pursuant to the Little Tucker Act, which vests district courts with concurrent jurisdiction with the Court of Federal Claims over civil actions or claims against the United States not in excess of $10,000. 28 U.S.C. § 1346(a)(2); *see Hoffmann,* 2001 WL 931588, *3;

Pls.' Opp'n to Defs.' Mot. for Summ. J. at 102-04; *id.* at 164 ("the jurisdictional limit of the Little Tucker Act has not been exceeded, and this Court may award Plaintiffs the relief they seek").[11]

As jurisdiction is proper in this court, this court is without power to transfer this action, in whole or in part, to the Court of Federal Claims. *See* 28 U.S.C. § 1631; *Hempstead County & Nevada County Project v. E.P.A.*, 700 F.2d 459, 462 (8th Cir.1983) (in order to transfer a case pursuant to 28 U.S.C. § 1631, "the court where the action is originally filed must find that there is a want of jurisdiction"); *Rogers v. United States*, 26 Cl.Ct. 1023, 1028 (1992) ("[A] transfer [pursuant to 28 U.S.C. § 1631] is a potentially available option only where the court finds that there is a want of jurisdiction in the transferor court.") (internal citations and quotations omitted); Defs.' Mot. in Opp'n to Pls.' Mot. to Transfer at 1 (noting that if the court denies plaintiffs' motion to file an amended consolidated complaint, "there is no basis, even in theory, for plaintiffs' [transfer] motion"). Consequently, plaintiffs' motion to transfer this case, in whole or in part, must be denied.

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11. The court notes that, "[t]he amount of a claim under the Little Tucker Act, for jurisdictional purposes, is based on the actual recovery sought by a plaintiff pursuant to that claim and is not based on the potential worth of the claim." *Smith v. Orr*, 855 F.2d 1544, 1553 (Fed.Cir.1988); *see Hahn v. United States*, 757 F.2d 581, 587 (3d Cir.1985) (noting that a court determining damages alleged for Tucker Act purposes should look to the complaint).

*Appendix B*

**C. Motion to Reconsider**

The court may now consider plaintiffs' motion for reconsideration. Here, plaintiffs ask this court to reconsider and reverse its previous ruling that plaintiffs, as non-resident aliens without "substantial connections" to the United States, cannot assert a Fifth Amendment claim for any of the disputed properties. *Hoffmann v. United States,* 53 F.Supp.2d 483, 489 (D.D.C.1999). Defendants oppose plaintiffs' motion, arguing, *inter alia,* that the mandate rule bars the court from revisiting this settled question. Defendants are correct.

In this court's June 1999 decision, after protracted analysis, this court squarely rejected plaintiffs' Fifth Amendment claim. *Id.* That decision, moreover, was explicitly affirmed by the Federal Circuit. In so affirming, the Federal Circuit provided:

> Plaintiffs argue that the Fifth Amendment does not distinguish between aliens and citizens, and note that the Supreme Court has held that Fifth Amendment protection can extend to a non-enemy alien. *Russian Volunteer Fleet v. United States,* 282 U.S. 481, 489 (1931). However, Constitutional protections extend to aliens only 'when they have come within the territory of the United States and developed substantial connections with this country.' *United States v. Verdugo-Urquidez,* 494 U.S. 259, 270 (1990). Because Plaintiffs have failed to establish 'substantial connections' to the United States, we

affirm the district court's decision with respect to Plaintiffs' Fifth Amendment claims.

*Hoffmann v. United States,* 2001 WL 931588, *4 (Fed. Cir. Aug. 16, 2001). Because the question at issue was expressly considered and decided by an appellate court, the mandate rule requires that this court, as an inferior court, honor that decision. *LaShawn A. v. Barry,* 87 F.3d 1389, 1393 n.3 (D.C.Cir.1996).

Under the mandate rule—a doctrine which plaintiffs altogether ignore—" 'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.' " *Indep. Petroleum Ass'n of Am. v. Babbitt,* 235 F.3d 588, 596-97 (D.C.Cir.2001) (quoting *Briggs v. Pennsylvania R.R. Co.,* 334 U.S. 304, 306 (1948)). Put simply, a trial court must "follow an appellate court's previous ruling on an issue in the same case." *United States v. Quintieri,* 306 F.3d 1217, 1225 (2d Cir.2002), *petition for cert. filed,* 71 U.S.L.W. 355 (Feb. 6, 2003) (No. 02-1191) (citations omitted). Thus, "'[w]hen a case is appealed and remanded, the decision of the appellate court establishe[s] the law of the case, which must be followed by the trial court on remand.'" *Griffin v. United States,* 935 F.Supp. 1, 5 (D.D.C.1995) (quoting J.W. Moore, 1B Moore's Federal Practice, ¶ 0.404[1] at p. II-3 (2nd ed.1994)). Accordingly, this court is barred from reconsidering the ruling of the Federal Circuit. Plaintiffs' motion for reconsideration is consequently denied.

*Appendix B*

## D. Defendants' Motion for Summary Judgment

The court next turns to defendants' renewed motion for summary judgment. In this motion, defendants argue that plaintiffs' implied-in-fact bailment claim to the non-vested portion of the photographic archive must be dismissed as time-barred, under the Little Tucker Act's statute of limitations.

Defendants filed this renewed summary judgment motion on May 1, 1998, but the motion was not fully addressed by this court's June 1999 memorandum opinion. On appeal, the Federal Circuit made clear, however, that this court was free-and was even encouraged-to consider defendants' renewed motion for summary judgment on remand. Before immersing itself in the resolution of defendants' motion, the court will pause to set the stage.

### 1. Factual Background Concerning the Non-Vested Portion of the Archive

Hoffmann Sr. served as a photographer in the Bavarian army and, in so doing, developed a close personal relationship with Adolf. During the course of this relationship, Hoffmann Sr. took two-and-a-half million photographs of the Fürer. In addition to his work for Hitler, from 1905 to 1945, Hoffmann Sr. owned and operated his family's photography business in Germany, which included a portrait studio, fine arts press, and press photography agency. Hoffmann Jr. joined his father's business in the mid-1930's and managed the press agency and a fine arts magazine. Hoffmann Sr. transferred

all of his then-existing photographic archives to Hoffmann Jr. on Hoffmann Jr.'s twenty-first birthday, October 24, 1937.

The instant controversy arose in May 1945, at the close of the Second World War. At that time, according to plaintiffs, the United States Army seized the portion of the Hoffmann archive that had been stored in the town of Winhöring Germany. In late 1945, the United States allegedly sent *part* of this Winhöring archive to Nürnberg, for use by the War Crimes Commission. This portion of the Winhöring archive ("the Nürnberg portion") was subsequently transferred to Frankfurt and then to Alexandria Virginia, on October 26, 1949. Thereafter, on May 31, 1951, the United States Assistant Attorney General and Director of Alien Property executed an order vesting all right, title, interest, and claim in the Nürnberg portion of the archive in the Attorney General of the United States, pursuant to the Trading with the Enemy Act, 50 U.S.C.App. § 1 *et seq. See* Vesting Order 17952, executed May 31, 1951, filed June 25, 1951, and published in the Federal Register on June 26, 1951, 16 Fed.Reg. 6162. The Nürnberg portion of the Winhöring archive is therefore the "vested" archive. Any claim plaintiffs may have had to the vested portion of the archive is now extinguished, as it is time-barred. *Hoffmann v. United States,* 53 F.Supp.2d 483 (D.D.C.1999) *aff'd in part, rev'd in part,* 2001 WL 931588, *6-7 (Fed. Cir. Aug. 16, 2001), *cert denied,* 535 U.S. 1112 (2002).

Thus, plaintiffs' claim here is for the "non-vested" portion of the archive. That is, plaintiffs allege that, in addition to these "vested" photos, the United States continues to possess the remainder of Hoffmann's archive that was

seized in Winhöring but that never made it to Nürnberg,[12] as well as "missing" portions of the archive that were seized by the United States Army in Freising and Bavaria. Plaintiffs initially sought recovery for the non-vested portion of the archive under two theories of liability: a conversion theory and a contractual bailment theory. In 1999, this court rejected plaintiffs' conversion claim because the court found that it was barred by the Federal Tort Claims Act's two-year statute of limitations. *Hoffmann,* 53 F.Supp.2d at 494. Plaintiffs' only surviving claim, then, concerns plaintiffs' contractual bailment theory.

**2. Implied-in-fact Bailment Contract**

Plaintiffs thus contend that they are entitled to the return of, or compensation for, the non-vested portion of the archive because an implied-in-fact contract of bailment was created in May 1945 when the United States Army seized the Hoffmann photographic collection. An implied-in-fact bailment contract with the Government is created if property is seized and there is "a promise, representation or statement by an authorized [G]overnment official" that the seized property will be returned. *Ysasi v. Rivkind,* 856 F.2d 1520, 1525 (Fed.Cir.1988) (quoting *Shaw v. United States,* 8 Cl.Ct. 796, 799 (1985)); *Montego Bay Imports, Ltd. v. United States,* 25 Cl.Ct. 639, 656 (1992). To prove that an implied-in-fact bailment contract exists, a claimant must show a "mutuality of intent to contract, offer and acceptance, and that the officer

12. According to plaintiffs, the Hoffmann photographic archive, seized by the United States in Winhoring in 1945, was two to three times larger than the inventory of images covered by the vesting order. *See* Pls.' Opp'n to Defs.' Mot. for Summ. J. at 43.

whose conduct is relied upon had actual authority to bind the government in contract." *H.F. Allen Orchards v. United States,* 749 F.2d 1571, 1575 (Fed.Cir.1984).

In this court's June 1999 opinion, this court found that the "record . . . is devoid of any promise, representation or statement by an authorized official to the Hoffmanns having either the purpose or effect of communicating an offer to return the archives." *Hoffmann,* 53 F. Supp. at 488. The court therefore concluded that plaintiffs had "failed to raise a genuine issue of material fact in support of the theory that an implied-in-fact bailment was created with respect to the Nürnberg photographic archives." *Id.* at 489.

The Federal Circuit did not agree, however. The Federal Circuit found that "[e]vidence in the record indicates that there is a possibility that both members of the United States Army as well as Hoffmann Jr. were under the impression that the non-vested photographs were on loan to the United States." *Hoffmann,* 2001 WL 931588, *7. Accordingly, that court concluded that "a genuine issue of material fact exists as to the existence of an implied-in-fact contract of bailment with respect to the non-vested portion of the archive." *Id.* at *8.

That finding did not end the inquiry, however. The Federal Circuit also found it likely that any claim, premised on the implied-in-fact bailment, was time-barred. As noted previously, defendants had raised this defense in their briefing, but this court had not reached the question, since the court found that no implied-in-fact bailment contract had been created.

*Appendix B*

**3. Summary Judgment Standard**

Before this court is defendants' renewed motion for summary judgment. Under Fed.R.Civ.P. 56, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions on file and affidavits show that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But the non-moving party's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor. *Laningham v. United States Navy*, 813 F.2d 1236, 1242 (D.C.Cir.1987). If the evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Anderson*, 477 U.S. at 249-50.

**4. Statute of Limitations**

The question now before this court is: if an implied-in-fact contract of bailment was created in May of 1945, when the United States Army seized the Hoffmann photographic collection, is a claim for the breach of that contract barred

by the applicable statute of limitations? *See Hoffmann,* 2001 WL 931588, *8. Upon careful consideration, the court finds that it is; plaintiffs' implied-in-fact bailment claim is time-barred.

As alluded to above, the Little Tucker Act sets up a jurisdictional scheme for certain claims against the United States, including claims for breach of an implied contract of bailment. *Waters v. Rumsfeld,* 320 F.3d 265, 270 (D.C.Cir.2003). Under the Little Tucker Act, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a) (1994). The Little Tucker Act's six-year statute of limitations is jurisdictional in nature. *Bray v. United States,* 785 F.2d 989, 992 (Fed.Cir.1986), *Cruz v. United States* 219 F.Supp.2d 1027, 1044 (N.D.Cal.2002); *Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States,* 373 F.2d 356, 358 (1967); *Mulholland v. United States,* 361 F.2d 237, 239 (1966). Thus, this court lacks jurisdiction to hear a claim not filed within the applicable time period.

Under the Little Tucker Act, a claim first accrues "when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1577 (Fed.Cir.1988) (citing *Kinsey v. United States,* 852 F.2d 556, 557 (Fed.Cir.1988)).[13] Generally, in the

13. In *Hopland Band of Pomo Indians,* the Federal Circuit was actually examining the accrual of a claim under 28 U.S.C. § 2501 (1982). Section 2501 and § 2401 have the same accrual language, however, and the rule stated in *Hopland* has been held to apply to actions brought pursuant to the Little Tucker Act. *See Hopland Band of Pomo Indians,* 855 F.2d at 1577 n. 3; *LeBeau v. United States,* 215 F.Supp.2d 1046, 1057 (D.S.D.2002); *Spehr v. United States,* 51 Fed.Cl. 69, 91 (2001).

case of a breach of a contract, a cause of action accrues at the time of the breach–when one fails to perform a contractual duty that is due. *Alder Terrace, Inc. v. United States,* 161 F.3d 1372, 1377 (Fed.Cir.1998); *Trauma Serv. Group v. United States,* 104 F.3d 1321, 1325 (Fed.Cir.1997); *Winstar Corp. v. United States,* 64 F.3d 1531, 1545 (Fed.Cir.1995), *aff'd,* 518 U.S. 839 (1996). In the case of a bailment contract, as we have here, "the breach, or failure to perform, occurs when the bailee refuses to return the property at the request of the owner." *Hoffmann,* 2001 WL 931588, *6 (citing *Ysasi,* 856 F.2d at 1525).

In the instant action, the court concludes that plaintiffs' claim accrued on May 20, 1949, because, at that time, the Government refused to return the photographic archive at Hoffmann Jr.'s request, and Hoffmann Jr. knew of the Government's refusal.[14] In In this conclusion, the court looks to the letter Hoffmann Jr. sent to the United States Army's Historical Division on June 17, 1949. This letter provides: "On 20 May 49 I was informed by Major Murphy, Historical Division, Frankfurt/Main, that my entire[15] photo archive had been forwarded to Washington *and I had no right to claim its return.* Because of the foregoing, as owner, I am compelled to lodge protest." Pls.' Ex. 85 at 1 (Hoffmann Jr. Ltr. June 17, 1949) (emphasis added). Any doubt concerning the

14. *See Hoffmann,* 53 F.Supp.2d at 493 (similarly finding that the plaintiffs' conversion claim for the non-vested portion of the archive accrued on May 20, 1949).

15. Elsewhere, the letter makes plain that, by the "entire archive," Hoffmann Jr. is referring to the part of the archive which was subsequently vested, as well as the non-vested portion of the archive. *See* Pls.' Ex. 85 at 1; *see also Hoffmann,* 53 F.Supp.2d at 493.

Government's intentions, and Hoffmann Jr.'s awareness thereof, is dispelled by what comes next. The letter goes on to state:

> I held the opinion until 20 May 49 that my property would be immediately returned to me. I regarded it as property on loan which I was to administer. The information of Army seizure therefore came as all the more of a shock to me. . . . In concluding I take the liberty of asking one more question. *Why am I being dispossessed of my archive?* . . . I can hardly believe that American colleagues who today photograph President Truman daily would agree with the principle that one day they would be dispossessed of their personal property taken without reason and without any court decision.

*Id.* at 2-3 (emphasis added); *see also* Pls.' Opp'n to Defs.' Mot. for Summ J. at 23-24 (noting that "the Historical Division, on instructions from Washington, decided to ship the whole Hoffmann File to the United States" and that "Hoffmann Jr. was told about the decision on May 20, 1949").

This letter is unambiguous. It demonstrates that, if an implied-in-fact contract of bailment was created in May of 1945 between Hoffmann Jr. and the Government, the Government, as bailee, breached that contract by May 20, 1949, when the Government refused to return the archive to Hoffmann, Jr., at his request. Furthermore, the letter demonstrates that, assuming a promise, representation or statement by an authorized government official had been made to return the seized property, by May 29, 1949,

Hoffmann Jr. *knew* that that promise had been repudiated. *See Hopland Band of Pomo Indians,* 855 F.2d at 1577. He knew that he had been, in his words, "dispossessed" of the archive. Pls.' Ex. 85 at 2. The court therefore concludes that, assuming an implied-in-fact bailment contract between Hoffmann and the United States existed, the United States breached that contract and Hoffmann, Jr., as bailee, was aware of the breach, by May 20, 1949. Plaintiffs' Tucker Act claim therefore accrued on that date.

Even if the court were to disregard Hoffmann Jr.'s forgoing statement, the court would still find that plaintiffs' cause of action accrued by 1956. The court reaches this conclusion because, on January 29, 1951, Hoffmann Jr. again protested the Army's confiscation of the photographs, and five years later, in March of 1956, an attorney hired by Hoffmann Jr. asserted a claim for their return. Defs.' Ex. A, Tab 7 (Land Ltr. to Brucker, Mar. 15, 1956). Hoffmann Jr.'s attorney was informed that the return of the property would have to occur through "diplomatic channels," and "[i]f Mr. Hoffmann desires to pursue this matter further, he may refer his claim to the German Foreign Office." Defs.' Ex. A, Tab 10 (Levie Ltr. to Land, May 22, 1956). The Government's response to Hoffmann Jr.'s counsel indicates the denial of the existence of any contract of bailment with respect to the photographs, including the non-vested portion of the archive, and by sending the letter to Hoffmann Jr.'s counsel, the Government put Hoffmann Jr. on notice of the breach.

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The court finds that plaintiffs' Little Tucker Act claim accrued on 1949. Plaintiffs' lawsuit was filed more than six years after that date. It is therefore time-barred.[16]

**a. Fraudulent Concealment**

Plaintiffs attempt to avoid this statute of limitations bar by arguing that the United States Government fraudulently concealed the existence of plaintiffs' cause of action. Plaintiffs claim that defendants' conduct thus tolled the statute of limitations because, in plaintiffs' words, "[t]he Army first embezzled the archives and then concealed this theft from Hoffmann Jr." Pls.' Opp'n to Defs.' Mot. for Summ. J. at 135; *see also id.* at 140. Plaintiffs' argument is without merit.

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16. In the face of this evidence, plaintiffs continue to insist that the breach of the implied-in-fact contract of bailment, did not occur until 1983 when plaintiffs' demands for the return of those archives were denied by the government. *See, e.g.*, Pls.' Opp'n to Defs.' Mot. for Summ. J. at 46 (noting that the Government's September 12, 1983, refusal to return to Hoffmann archive "was the first notice that employees in the Government were adopting a position as to the Hoffmann Photographic Archives that might require litigation" and that, it was not until that date, that the plaintiffs "acquired a cause of action against the Government"), *id.* at 105 ("[b]reach of the implied-in-fact contract of bailment, i.e., breach of the duty to return the property, occurred in 1983"); *id.* at 137 ("the [Government's] lawful possession and custody of the archives continued until demands were made in 1983, 1984 and 1996 for the return of the archives by the Plaintiffs"). Plaintiffs' claims are simply not supported by the record, however. Plaintiffs neither explain away the June 17, 1949, letter from Hoffmann Jr., nor do they point to any competent evidence, tending to establish their version of the facts concerning the time of the alleged breach.

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As both parties recognize, the equitable doctrine of fraudulent concealment can delay the accrual of a cause of action. Fraudulent concealment tolls a statute of limitations when: "(1) there has been 'deliberate concealment' of (2) 'material facts' relating to the alleged wrongdoing and (3) the wronged party does not know of those facts and could not have discovered them through 'reasonable diligence.'" *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB,* 130 F.3d 1083, 1087 (D.C.Cir.1997) (quoting *Fitzgerald v. Seamans,* 553 F.2d 220, 228 (D.C.Cir.1977)). *See also Hopland Band of Pomo Indians,* 855 F.2d at 1577; *Mitchell v. United States,* 13 Cl.Ct. 474, 477 (1987). Put another way, in order to find that the doctrine of fraudulent concealment applies, the court must find that the defendant actively misled the plaintiff, and that the plaintiff "had neither actual nor constructive knowledge of the facts constituting [her] cause of action despite her due diligence." *Grimmett v. Brown,* 75 F.3d 506 (9th Cir.1996) (citations and emphasis omitted).

There is no basis for such a finding here. Even taking the evidence in the light most favorable to plaintiffs, the court concludes that the United States Government had possession of the entire photographic archive by 1949, and, by that time, Hoffmann Jr. was on notice that he had a potential claim for the archive's return. *Japanese War Notes Claimants Ass'n of the Philippines,* 373 F.2d at 359 ("Once plaintiff is on inquiry that it has a potential claim, the statute can start to run."). In such a case, there is no genuine issue of material fact as to whether the doctrine of fraudulent concealment applies to toll the statute of limitations. *Cf. Mathews v. Kidder, Peabody & Co., Inc.* 260 F.3d 239, 256 (3rd Cir.2001) (describing the plaintiff's burden). The doctrine of fraudulent concealment, then, provides plaintiffs no comfort.

**b. Plaintiffs Other Assertion**

Plaintiffs finally appear to argue that statutes of limitations can never bar an action involving fraud or theft. *See* Pls.' Opp'n to Defs.' Mot. for Summ. J. at 124-25 ("Theft never starts the statute of limitations.") (citing *O'Keeffe v. Snyder,* 416 A.2d 862 (1980); *Menzel v. List,* 279 N.Y.S.2d 608 (1967), *rev'd,* 246 N.E.2d 742 (1969)). Assuming this is plaintiffs' argument, it is without support in law. Indeed, as defendants recognize, even the cases cited by plaintiffs make plain that the statute of limitations starts running when a putative plaintiff, deprived of property by fraud or theft, knows or should know that the putative defendant possesses the property and intends to retain it.

In sum, the court finds that any cause of action which plaintiffs might have asserted concerning the non-vested portion of the photographic archive accrued in 1949, or at the *very* latest by 1956, over twenty-five years before the instant action was filed. As such, plaintiffs' claim was filed beyond the Little Tucker Act's six-year limitations period and is time-barred. This court is without jurisdiction to further entertain plaintiffs' claims.

**E. Discovery-Related Motions**

As a final matter, the court notes that the following two discovery-related motions are currently pending before this court: (1) defendants' motion for a protective order staying all discovery; and (2) plaintiffs' motion to compel, filed pursuant to Rule 37. These motions must be denied, because they are rendered moot by the decision of this court granting

judgment in favor of defendants.

## III. CONCLUSION

For the forgoing reasons, it is this 30th day of May 2003, hereby

**ORDERED** that plaintiffs' motion for leave to file an amended consolidated complaint [# 36] is **DENIED**; and it is further

**ORDERED** that defendants' motion to strike plaintiffs' supplement to their motion to transfer the case in whole or in part, to the Court of Federal Claims [# 48] is **DENIED**; and it is further

**ORDERED** that plaintiffs' motion to transfer this case, in whole or in part, to the Court of Federal Claims [# 42] is **DENIED**; and it is further

**ORDERED** that plaintiffs' motion for reconsideration of the court's June 28, 1999, decision holding that non-resident friendly aliens are not entitled to protection under the Fifth. Amendment [# 47] is **DENIED**; and it is further

**ORDERED** that defendants' renewed motion for summary judgment [# 4] is **GRANTED**; and it is further **ORDERED** that defendants' motion for a protective order staying all discovery in these proceedings pending resolution of defendants' third renewed motion to dismiss [# 43] is **DENIED** as moot; and it is further

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**ORDERED** that plaintiffs' motion for an order under Rule 37 compelling defendants to answer interrogatories served and to disclose documents [# 54] is further **DENIED**. An appropriate order of judgment accompanies this memorandum opinion.

s/ Henry H. Kennedy, Jr.
Henry H. Kennedy, Jr.
United States District Judge

## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 9, 2004

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

03-1596

ROBERT H. HOFFMANN, HEIDEMARIE KRUGER, and The Estate of HENRIETTE HOFFMAN VON SCHIRACH, KLAUS VON SCHIRACH, Executor, and SUSANNE HUSTADT (deceased),

Plaintiffs-Appellants,

v.

UNITED STATES and JOHN D. ASHCROFT, Attorney General of the United States,

Defendants-Appellees.

**ORDER**

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

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UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on July 16, 2004.

FOR THE COURT,

s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: July 9, 2004

## APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED MAY 30, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 98-0857 (HHK)

ROBERT H. HOFFMANN, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

JUDGMENT

Pursuant to Fed. R. Civ. P. 58 and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 30th day of May 2003, hereby

ORDERED that judgment is entered in favor of defendants.

s/ Henry H. Kennedy, Jr.
Henry H. Kennedy, Jr.
United States District Judge

## APPENDIX E — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED AUGUST 16, 2001

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

No. 00-1131

ROBERT H. HOFFMANN, SUSANNE HUSTADT, KLAUS VON SCHIRACH, HEIDEMARIE KRUGER, HENRIETTE HOFFMANN VON SCHIRACH, and BILLY PRICE,

Plaintiffs-Appellants,

v.

UNITED STATES and John D. Ashcroft, ATTORNEY GENERAL OF THE UNITED STATES,

Defendants-Appellees.

DECIDED: August 16, 2001

Before MICHEL, SCHALL, and DYK, *Circuit Judges*.

SCHALL, *Circuit Judge*.

DECISION

Robert Hoffmann, Susanne Hustadt, Klaus von Schirach, Heidemarie Kruger, and Henriette Hoffmann von Schirach (collectively, "Plaintiffs") appeal the decision of the United States District Court for the District of Columbia denying

their claim with respect to certain property recovered by the United States Army at the end of World War II. *Hoffmann v. United States*, 53 F.Supp.2d 483 (D.D.C. 1999). Billy F. Price appeals his dismissal as a plaintiff. The case grows out of Plaintiffs' efforts to obtain the return of, or compensation for, a photographic archive and paintings formerly belonging to Heinrich Hoffmann Sr. ("Hoffmann Sr."). Specifically, the property at issue before the district court consisted of (1) four watercolors painted by Adolph Hitler; (2) a photographic archive compiled by Hoffmann Sr. and his son, Heinrich Hoffmann Jr. ("Hoffmann Jr."), part of which the Attorney General of the United States vested in 1951 pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 1 *et seq* ("TWEA"), and part of which remains non-vested but, at least allegedly, in the possession of the United States; and (3) the "Time-Life archive," a photographic archive given to the United States in the early 1980s by Time-Life, Inc.

Hoffmann Sr. and Hoffmann Jr. are both deceased. Plaintiffs are the heirs of Hoffmann Sr.'s children, Hoffmann, Jr. (Robert Hoffmann, Heidemarie Kruger, and Susanne Hustadt) and Henriette Hoffmann von Schirach (Klaus von Schirach, Executor of her estate). Price, an art investor and author of a Hitler biography, became involved in the case in 1982 when he learned that Hoffmann Sr. had been the owner of the watercolors. Price paid a nominal sum to the Hoffmann heirs in exchange for their rights in the watercolors and archives, promising to seek return of the property and to give Plaintiffs a portion of whatever compensation he might receive from the United States government.

*Appendix E*

The instant case was consolidated in the United States District Court for the Southern District of Texas on October 2, 1997, from two actions brought by Price and Plaintiffs in that court, in 1989 and 1997. The Texas district court held that the conveyance of an interest in the property to Price was an improper assignment of a claim of interest against the United States in violation of the Anti-Assignment Act, 31 U.S.C. § 3727 (1994). Accordingly, on March 24, 1998, Price was dismissed as a plaintiff, and the case was transferred to the District of Columbia.

The District of Columbia district court granted summary judgment in favor of the government after rejecting Plaintiffs' claims based on the theories of implied-in-fact contract (bailment), Fifth Amendment takings, and tortious conversion. On appeal, Plaintiffs challenge the order transferring the case to the District of Columbia (the "transfer order") and the rulings of the district court on their claims. Price challenges the transfer order and his dismissal from the case. We decline to consider the issue of the transfer order, and with it Price's dismissal from the case, because the issue of the transfer order was not raised in the district court. As far as the merits of the case are concerned, we *affirm* the district court's grant of summary judgment insofar as it relates to the watercolors. We also *affirm* the district court's grant of summary judgment with respect to the vested portion of the archive. Finally, we *vacate* the grant of summary judgment insofar as it relates to the non-vested portion of the archive and *remand*. We do so in order that the district court may determine in the first instance whether Plaintiffs' claim relating to the non-vested portion of the archive is barred by the applicable statute of limitations. In the event that the court determines that the

claim relating to the non-vested portion of the archive is not barred by the statute of limitations, it will be necessary for it to consider factual issues relating to Plaintiffs' contention that an implied-in-fact contract arose relating to that property.[1]

## DISCUSSION

### I.

In May of 1945, the United States Army seized the portion of the Hoffmann archive that was stored in Winhoring, Germany and sent parts of what was seized to Nuremberg for use by the War Crimes Commission. On May 31, 1951, the Assistant Attorney General and Director of Alien Property executed an order vesting all right, title, interest and claim in the Nuremberg portion of the archive in the Attorney General of the United States. Plaintiffs contend that the United States Army possesses the rest of the Winhoring archive, as well as photographs seized at other locations in Germany. These are the photographs that comprise the non-vested portion of the Hoffmann archive. In addition to the photographs, the United States Army also seized the four Hitler watercolors. The Army transferred the watercolors to a central collecting facility in Munich, and subsequently shipped them to the United States.

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1. Plaintiffs do not challenge the rulings of the district court with respect to the Time-Life archive.

*Appendix E*

II.

Together with Price, Plaintiffs brought suit in the United States District Court for the Southern District of Texas in 1983 for the return of the watercolors and the photographs that the United States Army had seized. Alternatively, Price and Plaintiffs sought money damages for the tortious conversion of the property. Eventually, in 1989, the district court entered partial summary judgment on the issue of liability in Price's and Plaintiffs' favor, on the ground that the United States had wrongfully converted the property by refusing to return it. *Price v. United States*, ("*Price I*"), 707 F. Supp. 1465 (S.D. Tex. 1989). Subsequently, the court awarded Price and Plaintiffs nearly $8 million in damages. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court and remanded the case for entry of judgment of dismissal with prejudice as to the claims for the watercolors and photographs, other than the Time-Life archive. *Price v. United States*, ("*Price II*"), 69 F.3d 46, 54 (5th Cir. 1995). Regarding the watercolors, the court ruled that evidence in the record indicated that a tortious conversion of the paintings occurred in Germany, when the paintings were seized and shipped to the United States, not upon the United States' refusal to return the property to the Hoffmann family. *Id.* at 52. Regarding the photographs, the court ruled that the vesting order placed Plaintiffs' claim outside the United States' waiver of sovereign immunity. *Id.* Additionally, the court held, any challenge to the vesting order itself was barred by the statute of limitations pursuant to 50 U.S.C. App § 33 (1988). *Id.* at 53. The Fifth Circuit dismissed the claim relating to the Time-Life archive without prejudice, because Price had failed to

exhaust his administrative remedies under the Federal Torts Claim Act ("FTCA"), 28 U.S.C. § 2401(b) (1988). *Id.* On petition for rehearing, the Fifth Circuit concluded that the vesting order did not cover all of the photographs allegedly seized by the United States Army. *Price v. United States*, ("*Price III*"), 81 F.3d 520 (5th Cir. 1996). Therefore, the court dismissed the portion of the claim relating to the photographs not subject to the vesting order. The court stated that the dismissal was without prejudice to "a separate lawsuit pending in the district court." *Id.* That "separate lawsuit" was the 1989 action in the Southern District of Texas, which subsequently was consolidated with the 1997 action in the same court.

III.

As noted above, what was before the district court in the District of Columbia was a consolidated complaint that originally was filed in the Southern District of Texas. With respect to the bailment claims, the District of Columbia court concluded that Plaintiffs had failed to raise a genuine issue of material fact as to whether an implied-in-fact contract of bailment was created with respect to any of the property, because they could not show that the United States had taken the watercolors or any of the photographs, whether or not covered by the vesting order, with the intention of returning them. *Id.* at 489-90. Similarly, with respect to the Fifth Amendment claims, the court determined that Plaintiffs had failed to establish the necessary voluntary or contractual relationship with the United States to avail themselves of the Fifth Amendment as non-residents. *Id.* at 491. As far as Plaintiffs' FTCA claims were concerned, the district court

ruled that res judicata barred review of the Fifth Circuit's dismissal of the claim for the watercolors. *Id.* at 493. With respect to the non-vested portion of the archive, the court concluded that the conversion claims accrued on May 20, 1949, when Hoffmann was informed of the fact that the United States forwarded his entire archive to Washington. *Id.* Therefore, the court held, Plaintiffs' claims, to the extent that they were grounded in tort, were barred by the statute of limitations. *Id.*

The district court granted summary judgment in favor of the government on all claims except the Time-Life archive. *Id.* at 495. As noted above, subsequent to the decision, Plaintiffs relinquished their claims against the government with respect to the Time-Life archive.

IV.

We have jurisdiction to review the decision of a district court that is based in whole or in part on 28 U.S.C. § 1346(a)(2) (1994), the Little Tucker Act. 28 U.S.C. § 1295(a)(2) (1994). The Little Tucker Act grants concurrent jurisdiction in the Court of Federal Claims and the United States district courts for any "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2) (1994). In their consolidated complaint, Plaintiffs claim $9000 in contract damages for the four watercolors, as well as $9000 for the non-vested portion of the archive.

*Appendix E*

The instant appeal also includes claims based not only on the Little Tucker Act, but also on the FTCA. While we ordinarily do not have appellate jurisdiction over FTCA claims, see 28 U.S.C. § 1295(a)(2), "a mixed case, presenting both a nontax Little Tucker Act claim and an FTCA claim, may be appealed only to the Federal Circuit." *United States v. Hohri*, 482 U.S. 64, 75-76 (1987); *see also Gollehon Farming v. United States*, 207 F.3d 1373, 1378 (Fed. Cir. 2000). Thus, because the district court had jurisdiction over this case based in part on the Little Tucker Act, we retain exclusive appellate jurisdiction over all the claims present in the case.

V.

As noted above, the United States District Court for the Southern District of Texas ordered the case based upon the consolidated complaint transferred to the District of Columbia after it dismissed Price from the case. In arguing that the case should not have been transferred, Plaintiffs and Price contend that the court erred in the underlying ruling, the dismissal of Price from the case. We decline to consider Plaintiffs' challenge to the order that transferred the case from the Texas district court to the District of Columbia. Once a motion to transfer has been granted and the action has been transferred, the losing party must make a motion to retransfer the case in the transferee district court in order to preserve the issue for appeal. 17 James Wm. Moore et al., Moore's Federal Practice, ¶111.64[2][b] (3d ed. 1999). If no motion is made, neither the transferee circuit nor the transferor circuit has jurisdiction to review the transfer order. *Id*; *Hill v. Henderson*, 195 F.3d 671, 677 (D.C. Cir. 1999) (noting that

the term "jurisdiction" as applied to a court's ability to review a transfer order, refers to venue rather than subject matter jurisdiction). In this case, it is undisputed that Plaintiffs made no motion to retransfer the case back to the Texas district court. Since parties may normally consent to be sued in a court that would otherwise be an improper venue, Plaintiffs' failure to object waives the issue. *See* Fed. R. Civ. P. 12(h)(1); *Hill*, 195 F.3d at 677 n.2 (citing *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996)). Accordingly, we will not review the transfer order or the underlying ruling dismissing Price from the case based upon a violation of the Anti-Assignment Act.

VI.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Ysasi v. Rivkind*, 856 F.2d 1520, 1524 (Fed. Cir. 1988). We review a grant of summary judgment without deference. *Ysasi*, 856 F.2d at 1524. In addition, we must, as the district court was required to do, draw all reasonable factual inferences in favor of the nonmovant. *Anderson*, 477 U.S. at 255.

Plaintiffs challenge all aspects of the district court's ruling, including the conclusion that Plaintiffs, as non-resident aliens, cannot assert a Fifth Amendment claim for any of the disputed properties. Plaintiffs argue that the Fifth Amendment does not distinguish between aliens and citizens,

and note that the Supreme Court has held that Fifth Amendment protection can extend to a non-enemy alien. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931). However, constitutional protections extend to aliens only "when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990). Because Plaintiffs have failed to establish "substantial connections" to the United States, we affirm the district court's decision with respect to Plaintiffs' Fifth Amendment claims. We therefore turn to Plaintiffs' contract and tort claims with respect to each of the remaining items of property at issue.

A. *Watercolors*

Plaintiffs allege that an implied-in-fact contract of bailment was created when the United States Army seized the four paintings. "Tucker Act jurisdiction extends only to contracts either express or implied-in-fact, and not to claims on contracts implied in law." *Hercules Inc. v. United States*, 516 U.S. 417, 423 (1996); *Trauma Serv. Group v. United States*, 104 F.3d 1321, 1324-25 (Fed. Cir. 1997). Plaintiffs allege that an implied-in-fact bailment contract was created when the United States Army seized the four paintings from Hoffmann's home and removed them to the Munich Central Collection Point in 1946. Whether a contract exists is a mixed question of law and fact. *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998). To prove that an implied-in-fact bailment contract exists, a claimant must show a "mutuality of intent to contract, offer and acceptance, and that the officer whose conduct is relied upon had actual

authority to bind the government in contract." *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984). For the United States to be bound by an implied-in-fact contract of bailment, there must be "a promise, representation or statement by any authorized government official" that the property would be returned. *Ysasi*, 856 F.2d at 1525. Plaintiffs contend that the Army's conduct with respect to the watercolors demonstrates the existence of a bailment. Plaintiffs presented testimony that the Munich Central Collection Point, where the paintings were held before being shipped to the United States, was established for the purpose of identifying seized objects for return to their owners. *Id.* at 490. The Army's transfer of the paintings to the collection center, Plaintiffs argue, demonstrates that the United States intended to return the paintings to their original owners.

While the decision of the Fifth circuit is not collateral estoppel on this issue, we agree with the Fifth Circuit that the evidence "will not support a conclusion that the *watercolors* were held in bailment." *Price II*, 69 F.3d at 52 (emphasis in the original). The district court correctly held that evidence as to the general purpose of the Munich Central Collection Point is insufficient to support the specific inference that the Army brought the paintings to the collection center with the intention of returning them to the Hoffmann family. Plaintiffs fail to allege that an official with authority actually bound the United States to return the paintings. Significantly, the Army returned other artwork belonging to Hoffmann Sr. about the same time the watercolors were confiscated, but continued to retain possession of the watercolors painted by Hitler. *Hoffmann*, 53 F.Supp.2d at

492 (citing *Price II*, 69 F.3d at 51). The divergent conduct indicates, if anything, an intent not to return the watercolors, as the Army could have returned the paintings as it did the rest of Hoffmann Sr.'s art collection. We therefore affirm the district court's grant of summary judgment as it relates to the watercolors.

B. *Vested Portion of the Archive*

Plaintiffs challenge the district court's ruling that they failed to present sufficient evidence to show that a genuine issue of material fact existed as to whether a bailment contract was created when the United States took a portion of the Hoffmann family photographs for use at Nuremberg. A bailment was created in May of 1945, Plaintiffs argue, from the conversations between Hoffmann Jr. and certain Army personnel at Nuremberg. In the district court, the government argued that no implied-in-fact contract was created with respect to the vested archive and that, in any event, any claim based upon such a contract was barred by the applicable statute of limitations. The district court did not address the government's statute of limitations argument. Instead, it granted summary judgment based upon the merits. Even assuming that such a contract was created, we conclude that any claim for it is time-barred.

The Little Tucker Act sets up a jurisdictional scheme for certain claims against the United States. *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1556 (Fed. Cir. 1991). The six-year statute of limitations of the Little Tucker Act, 28 U.S.C. § 2401(a) (1994), is a limitation on the district court's jurisdiction. *Bray v. United States*, 785 F.2d 989, 992 (Fed.

Cir. 1986). Because jurisdictional determinations are questions of law, we review de novo a court's decision to dismiss a claim as barred by a statute of limitations. *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (discussing 28 U.S.C. § 2501, the analogous statute of limitations for suits against the government brought in the Court of Federal Claims, *see Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 n.3 (Fed. Cir. 1988)).

A claim first accrues for purposes of 28 U.S.C. § 2401(a), (and its analogous 28 U.S.C. § 2501), "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Alder Terrace*, 161 F.3d at 1377 (quoting *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988); *see also Hopland*, 855 F.2d at 1577 (stating that a claim accrues only when "all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence"). Generally, in the case of a breach of a contract, a cause of action accrues when the breach occurs. *Alder Terrace*, 161 F.3d at 1377. A breach of contact is a failure to perform a contractual duty when it is due. *Trauma Serv. Group*, 104 F.3d at 1325. In the case of a bailment contract, the breach, or failure to perform, occurs when the bailee refuses to return the property at the request of the owner. *See Ysasi*, 856 F.2d at 1525.

Any bailment contract that might have been created with respect to the vested portion of the archive plainly was breached in 1951 by the vesting order. Plaintiffs attempt to avoid this problem, however, by challenging the validity of the vesting order under the TWEA. The TWEA provides that

"[a]ny person not an enemy or ally of an enemy claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him . . . may file with the said custodian a notice of his claim" for the President to determine entitlement. 50 U.S.C. App. § 9(a) (1994). However, under the TWEA, any claim that is instituted "after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought" is barred. 50 U.S.C. App. § 33 (1994). The district court held that Plaintiffs TWEA claims were barred by this statute of limitations, because the vesting order was dated May 31, 1951.

The Fifth Circuit decided that Plaintiffs' challenge to the validity of the vesting order under the TWEA was barred by the statute of limitations because the vesting order was dated May 31, 1951. Because Plaintiffs had a full and fair opportunity to litigate this exact issue in the first action in Texas, and because the Fifth Circuit's ruling on this issue was necessary to the judgment in that action, Plaintiffs are precluded from relitigating their challenge to the vesting order in this action. *See Innovad Inc. v. Microsoft Corp.*, 2001 WL 877583, *6 (Fed. Cir. 2001) (citing *In re Freeman*, 30 F.3d 1459, 1465, 31 USPQ2d 1444, 1448 (Fed. Cir. 1994)). We therefore affirm the district court's grant of summary judgment with respect to the vested portion of the archive. We do so on the ground that the claim is time-barred.

*Appendix E*

C. *Non-Vested Portion of the Archive*

Finally, we turn to Plaintiffs' claims that an implied-in-fact contract of bailment was created with respect to the non-vested portion of the archive. The district court did not address the government's statute of limitations argument with respect to the non-vested portion of the archive and granted summary judgment instead based upon the merits. As far as the merits are concerned, Plaintiffs did not present evidence specifically regarding the bailment of the non-vested portion of the archive, stating merely that the evidence presented regarding the vested portion of the archive applied to the entire archive. Plaintiffs contended that an implied-in-fact contract of bailment was created in May of 1945 when the United States Army seized the entire Hoffmann photographic collection from Germany.

Evidence in the record indicates that there is a possibility that both members of the United States Army as well as Hoffmann Jr. were under the impression that the non-vested photographs were on loan to the United States. Specifically, Plaintiffs' presented a 1948 Opinion of Chief of the Historical Division in Washington stating that "technically, [Hoffmann's] files are probably his personal property." A March 14, 1949 memorandum of Major Raymond Hill to a Colonel Potter noted that Major Hill "had received authority from Berlin to transfer the entire Hoffmann photographic collection to the Historical Division. Captain Paul stated that he had previously been under the assumption that the collection would revert to the ownership of Hoffmann upon completion of its use." Additionally, a 1949 letter from a Colonel Harris to Colonel Potter stated that it "seems likely" that the archive will be returned to its original owner.

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In February of 1950, the Army requested that Hoffmann Jr. provide certain information "[i]n order to determine the exact legal status of the photographic file of which you are the alleged former owner." The Army expressed its concern in a January 24, 1950, letter to the Historical Division that it did not "acquire title" to the missing archive, raising the possibility that it "could be required to return it and fix compensation for its use when peace is made." Finally, in a 1951 memorandum, the Chief of the Historical Division in Europe stated "[i]f it can be proven that part of the Hoffmann photographic file does not fall within the classification of property the existence of which is prejudicial to the United States Government and any of its agencies, then our retention of such property, it is believed, cannot be justified legally." Evidence suggesting that the legal status of the non-vested portion of the archive was unresolved raises the possibility of "a promise, representation or statement by any . . . authorized government official," *Ysasi*, 856 F.2d at 1525, that the property was being held in bailment until its return.

In Hoffmann Jr.'s June 17, 1949 letter he wrote, "an American jurist also assured me, after a private inquiry, that there was a U.S. regulation in force that could not deprive me of my archive. . . . I held the opinion until 20 May 49 that my property would be returned to me." In a May 15, 1950 letter Hoffmann Jr. wrote that "I was assured by U.S. officials at Nuremberg that my photo archives were regarded by the U.S. Army as a loan for the duration of the trials." In the highly unusual circumstances of this case, evidence of Hoffmann's impressions from the United States officials demonstrates the possibility that an "authorized government official," *Ysasi*, 856 F.2d at 1525, represented that the United

States Army would return the photographs to Hoffmann Jr. We therefore conclude that, based upon the material of record that has been presented to us, a genuine issue of material fact exists as to the existence of an implied-in-fact contract of bailment with respect to the non-vested portion of the archive.

At the same time, however, evidence in the record indicates that, at some time prior to March 14, 1949, authority was granted for the Army to transfer the "entire Hoffmann photographic collection," both vested and non-vested portions, to the United States. Hoffmann Jr.'s June 17, 1949 letter to the Army's Historical Division indicated that he was aware of the two parts of his archive — the portion used in Nuremberg and the rest — and protested the Army's possession of both portions: "On 20 May 49 I was informed by Major Murphy, Historical Division, Frankfurt/Main, that my entire photo archive had been forwarded to Washington and I had no right to claim its return." After a series of letters exchanged between Hoffmann Jr. and the United States, the Army shipped the entire archive to the United States without returning any portion to the Hoffmann family. On January 29, 1951, Hoffmann Jr. again protested the Army's confiscation of the photographs. In March of 1956, an attorney hired by Hoffmann Jr. asserted a claim for the return of the photographs. The attorney was informed that the return of the property would have to occur through "diplomatic channels," and "[i]f Mr. Hoffmann desires to pursue this matter further, he may refer his claim to the German Foreign Office." This response to the letter from Hoffmann Jr.'s counsel indicates the denial of the existence of any contract of bailment with respect to the photographs, including the

non-vested portion of the archive, which denial would be a breach of contract. Since the breach occurred more than six years before suit was filed, any claim based upon it relating to the non-vested portion of the archive would be time-barred.

While the foregoing suggests merit to the government's statute of limitations argument, we believe that, in the first instance, the issue should be addressed by the district court, particularly in view of the voluminous record in this case. The question to be addressed is, assuming that an implied-in-fact contract of bailment existed, at what point did the government fail to perform on the contract.

For the foregoing reasons, we *affirm* the district court's grant of summary judgment insofar as it relates to the watercolors and the vested portion of the archive. We *vacate* the grant of summary judgment insofar as it relates to the non-vested portion of the archive and *remand* the case for further proceedings consistent with this opinion.

Each party shall bear its own costs.

## APPENDIX F — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED JUNE 28, 1999

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**Civil Action 98-0857 (HHK)**

**ROBERT H. HOFFMANN, ESTATE OF HENRIETTE HOFFMAN VON SCHIRACH, HEIDEMARIE KRUGER and SUSANNE HUSTADT,**

**Plaintiffs,**

**v.**

**UNITED STATES OF AMERICA and JANET RENO, as ex officio ALIEN PROPERTY CUSTODIAN,**

**Defendants.**

### MEMORANDUM OPINION

Plaintiffs, German citizens, have brought this action to recover photographic archives and paintings formerly belonging to Heinrich Hoffmann Sr. Their claims are for contract damages and tort damages, and for violations of the Fifth Amendment and the Trading With the Enemy Act.[1]

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1. The Consolidated Complaint also purports to state a claim for relief under Article 53, Annex to the Hague Convention IV. Compl. (Cont'd)

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Before the court are defendants' motion to dismiss or for summary judgment and plaintiffs' motion for summary judgment. Upon consideration of the motions, the responses thereto, and the entire record of this case, the court concludes that defendants' motion for summary judgment should be granted with respect to all claims except for those with respect to the Time-Life archives, as described below.

## I. Factual Background

This lawsuit is "simply a claim for damages resulting from the tortious conversion of chattels" by the United States. *Price v. United States*, 69 F.3d 46, 48 (5th Cir. 1995); *cert. denied*, 519 U.S. 927 (1996). The chattels consist of photographic archives compiled by Heinrich Hoffmann ("Hoffmann Sr.") and his son, Heinrich Hoffmann Jr. ("Hoffmann Jr.") and four watercolor paintings by Adolf Hitler. Plaintiffs are the Estate of Henriette von Schirach, Hoffmann Sr.s daughter, Robert H. Hoffmann, Heidemarie Kruger, and Susanne Hustadt.

According to a biographical record submitted by plaintiffs, during World War I, Hoffmann served as a photographer in the Bavarian army. He first met Adolf Hitler in 1919, "the beginning of an intimate personal relationship":

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(Cont'd)

¶ 5. Within the counts of the complaint, however, the alleged violation of Article 53 serves only as a predicate to the Federal Tort Claims Act claims alleged in Count 17, and, by reference, Count 18. Compl. ¶ 120, 134. The complaint does not state an independent Hague Convention claim.

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Hitler would often visit the Hoffmanns' home in Munich for relaxation. It was through the photographer that the future leader of the Third Reich first met Eva Braun who worked in his shop, and Hoffmann also frequently drove him to the Wagner home in Bayreuth to see Frau Winifred Wagner. In 1920 Hoffmann joined the [National Socialist Workers' Party] and soon belonged to the inner circle of Hitler's intimate companions. The only man allowed to photograph the Führer, he accompanied him everywhere on his road to power and later, during World War II, travelled with him to all the various fronts. Hoffmann's two-and-a-half million photographs provide a unique record of twenty-five years of German history and helped to make him an enormously wealthy man, as well as enriching Hitler himself and enhancing his popularity. . . . It was Hoffmann's idea that Hitler should receive a royalty for every photograph of himself which appeared on a postage stamp, which led to the accumulation of enormous sums of money to the Führer's account. Hoffmann was tried as a Nazi profiteer in 1947, sentenced to ten years' imprisonment (later reduced to three, then raised to five years in 1950) and nearly all of his personal fortune was confiscated. He died in Munich on 16 December 1957.

Robert Wistrich, Who's Who in Nazi Germany 155, Pl. Ex. 405, Attach. 12; see also 1 Christian Zentner & Friedemann Bedürftig, eds., The Encyclopedia of the Third Reich 437 (Amy Hackett trans., 1991). But see Pl.'s Br. Supp. Summ. J. at ¶ 19 (stating that Hoffmann's sentence was for four years).

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In addition to his work for Hitler, from 1905 to 1945 Hoffmann Sr. owned and operated his family's photography business in Germany, which included a portrait studio, a fine arts press, and a well-known press photography agency. Beginning with a collection of photographs dating from the 1860s through the early 1900s that he had obtained from his grandfather, father, uncle, Hoffmann Sr. built a vast archive of photographic images.

Hoffmann Jr. joined his father's business in the mid-1930s, and managed the press agency and a fine arts magazine from 1940 to 1945. In 1937 Hoffmann Sr. transferred all of his then-existing photographic archives to Hoffmann Jr. After that date, both father and son continued to accumulate photographs in their respective archives.

According to plaintiffs, the U.S. Army in May 1945 seized the portion of the Hoffmann archives that had been stored in the town of Winhöring. In late 1945, the U.S. sent part of the archives seized in Winhöring to Nürnberg for use by the War Crimes Commission from 1945 to 1949. This "Nürnberg archive" was subsequently transferred to the Army's Historical Division in Frankfurt on April 27, 1949, and thereafter shipped to the Army's German Military Documents Section in Alexandria, Virginia, on October 26, 1949. On May 31, 1951, the Assistant Attorney General and Director of the Office of Alien Property executed an order vesting all rights, title, interest and claim in the Nürnberg archive in the Attorney General of the United States. Ex. P-133.

In addition to the photographic archive covered by the vesting order, plaintiffs allege that the Army also continues

to possess the remainder of the archives that were seized in Winhöring, as well as "missing" portions of the Hoffmann photographic archives that had been seized by the Army in Freising and Bavaria. *See* Pl.'s Statement of Facts ¶ 39-40.

Plaintiffs also allege that the Army possesses four watercolors painted by Hitler that Hoffmann Sr. acquired during the 1930s and 1940s. After the war, United States troops discovered the watercolors in the village of Dietramszell and transferred them to a central collecting facility in Munich. The military authorities there in 1949 ordered the paintings to be transferred to Wiesbaden, from where they were shipped to the United States. Pl.'s Statement of Facts ¶ 68-71, 73.

Between 1949 and 1951, Hoffmann Jr. wrote various officers of the Historical Division protesting the Army's transfer of his "entire photo archive" to the United States. *See* Ex. P-85; *see also* P-93, P-97, P-99, P-105, P-109, P-125. Unbeknownst to Hoffmann Jr., however, a further portion of the Hoffmann photographic archives had been taken from Hoffmann's Berlin studio in May 1945 by a LIFE magazine photographer. *See* Ex. P-163. These archives (the "Time-Life archives") came into the possession of the United States in the early 1980s, when Time-Life Inc. donated it to the U.S. Military History Institute in Carlisle, Pennsylvania.

Plaintiffs in the present case, together with Texas businessman Billy Price, initially brought suit for the return of the watercolors and photographic archives in the Southern District of Texas in 1983. The district court entered a partial summary judgment on the issue of liability in Price's favor.

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*Price v. United States*, 707 F. Supp. 1465 (S.D. Tex. 1989). On appeal, the Fifth Circuit reversed and remanded for entry of judgment of dismissal with prejudice as to the claims for the watercolors and the photographic archives other than the Time-Life archives. 69 F.3d 46, 54 (5th Cir. 1995). Finding that Price had failed to exhaust administrative remedies with respect to the Time-Life archives, the appeals court dismissed the claims for those archives without prejudice. *Id.* On petition for rehearing, the Fifth Circuit noted that the vesting order did not cover all of the Hoffmanns' photographic archives alleged to have been seized by the Army in Germany. 81 F.3d 521 (5th Cir. 1996). Accordingly, the Fifth Circuit held that with respect to the archives not covered by the vesting order, its dismissal was also without prejudice to the present lawsuit.

The instant case was consolidated in the Southern District of Texas on October 2, 1997, from two actions brought by the same plaintiffs, including Price, in 1989 and 1997. That court held that a conveyance to Price by plaintiffs von Schirach and Hoffmann Jr. of their interests in the photographic archives was an assignment of a claim against the United States in violation of the Anti-Assignment Act. Accordingly, on March 24, 1998, Price was dismissed as a plaintiff, and the case was transferred to this court.

The claims remaining in the consolidated complaint are as follows. Plaintiff Estate of von Schirach seeks damages for breach of contract or violation of the takings clause of the Fifth Amendment (count 3), and specific performance (count 4), with respect to the watercolors. All plaintiffs seek damages for the General Services Administration's refusal

to turn over the photographic archives not covered by the vesting order to von Schirach and Hoffmann Jr. under tort law (count 9) and the Federal Tort Claims Act (count 10). All plaintiffs also seek damages for breach of contract or violation of the takings clause of the Fifth Amendment (count 11), and specific performance (count 12), with respect to the photographic archives not covered by the vesting order. For the Army's failure to return the Time/Life archives, plaintiffs seek damages under tort law (count 13) and the takings clause of the Fifth Amendment (count 14), and specific performance (count 15). With respect to the archives covered by the vesting order, plaintiffs seek review of the validity of the vesting order under the Trading With the Enemy Act and the takings clause of the Fifth Amendment (count 16), and damages for conspiracy and fraudulent concealment under the Federal Tort Claims Act (count 18).

## II. Standards of Review

### A. Dismissal

A Rule 12(b)(6) motion "tests the legal sufficiency of the complaint." *ACLU Foundation of Southern Calif. v. Barr*, 952 F.2d 457, 472 (D.C. Cir. 1991). When reviewing such motions, the court must take the allegations in non-movant's pleading as true and must construe them in a light most favorable to the non-moving party. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983). Reviewed in this light, a motion to dismiss may not be granted "unless it appears that a plaintiff can prove no facts in support of the claim which would entitle the plaintiff to relief." *Conley*, 355 U.S. at 45-46.

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**B. Summary Judgment**

A motion for summary judgment should be granted if and only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party's "initial responsibility" consists of "informing the [trial] court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986) (internal quotation marks omitted).

If the moving party meets its burden, the burden then shifts to the non-moving party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355 (1986). The non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor. *Laningham v. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987). Such evidence must consist of more than mere unsupported allegations or denials and must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322 n.3, 106 U.S. at 2552 n.3. If the evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511 (1986).

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## III. Discussion

### A. The Contract/Bailment Claims

The United States is "immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Testan*, 424 U.S. 392, 399 (1976) (quotation omitted). While the Tucker Act, 28 U.S.C. § 1491(a), confers jurisdiction to hear and determine claims against the United States founded upon any "express or implied" contract with the United States, "this jurisdiction extends only to contracts either express or implied in fact, and not to claims on contracts implied in law." *Hercules Inc. v. United States*, 516 U.S. 417, 423 (1996). Accordingly, plaintiffs have alleged the existence of contracts implied in fact binding the United States to return each of the properties in issue in this case.

#### 1. The Archives Covered by the Vesting Order

Plaintiffs contend that an "implied-in-fact bailment" was created between the Army and the Hoffmanns whereby there was a "fiduciary obligation that, some day the Army would have to return the Nürnburg photographic archives to the Hoffmanns and pay compensation." Pl.'s Statement of Facts ¶ 32 (citing Ex. P-129 and P-91, ¶ 5). As principal support for this theory, plaintiffs offer the following text from a March 28, 1951, decision of the Judge Advocate General:

> Assuming, as is stated in the submitted file, that the Hoffmann photographic file was seized in

> furtherance of the objectives set out in subparagraph 3-III of the Potsdam Agreement, it is the opinion of this office that the mentioned photographic file is being legally held by the Department of the Army.

Ex. P-129. Plaintiffs also cite a January 24, 1950, memorandum from the Special Staff of the Historical Division in Washington to the division's European office noting "the possibility, if we use the Hoffmann file, that under the provisions of Article 53, Annex to the Hague Convention IV, the Army could be required to return it and fix compensation for its use when peace is made." Ex. P-91, ¶ 5.

To demonstrate an implied-in-fact contract binding the United States within the meaning of the Tucker Act, plaintiffs must show "mutuality of intent to contract, offer and acceptance, and that the officer whose conduct is relied upon had actual authority to bind the government in contract." *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (quoting *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985)). Thus, an implied-in-fact contract "must be stated in the form of an undertaking, not as a mere prediction or statement of opinion or intention." *Cutler-Hammer v. United States*, 441 F.2d 1179, 1182 (Ct. Cl. 1971). For the government to be bound by an implied-in-fact bailment, there must be "a promise, representation or statement by any authorized government official" that the property would be returned. *See id.* (citation omitted).

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The record, however, is devoid of any promise, representation or statement by an authorized official to the Hoffmanns having either the purpose or effect of communicating an offer to return the archives. The Judge Advocate General's decision, far from suggesting that the archives would be returned to the Hoffmanns, concludes that the archives were "being legally held" by the Army. The Historical Division's internal memorandum notes a "possibility" that the Army would be required to return the archives, but nowhere contains a promise, representation or statement that it would actually do so.

Each of the other documents offered in support of plaintiffs' bailment theory refers to the return of the archives as a possibility or contingency, not as an undertaking. *See* Letter from Harry J. Malony, Chief of the Historical Division in Washington, to the Historical Division in Europe, of 12/30/48, Ex. P-74 (opining that "technically, his files are probably his personal property"); Memorandum from Maj. Raymond D. Hill to Col. Potter of 3/14/49, Ex. P-79 (noting that "Capt. Paul stated that he had previously been under the assumption that the collection would revert to the ownership of Hoffmann upon completion of its use"); Letter from Lt. Col. E.M. Harris to the Historical Division in Europe, Ex. P-87 (stating that "[i]t seems likely" that the file will have to be returned to its original owner in Germany); Memorandum of Judge Advocate General of 11/18/49, Ex. P-90 (finding that the Nürnberg archive was "propaganda which is aimed at keeping alive, reviving or promoting the military or Nazi spirit and institutions, or glorifying war," within the meaning of Control Council Law No. 8, and therefore "may not at present be returned to the owner");

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Memorandum from W.S. Nye, Chief of Historical Division in Europe, to Col. Hanley, Judge Advocate Division of 2/5/51, Ex. P-127 (stating that "[i]f it can be proven that a part of the Hoffmann Photographic File does not fall within the classification of property the existence of which is prejudicial to the United States Government and any of its agencies," retention of the Hoffmann Photographic File by the United States cannot be justified legally). None of these documents is addressed to the Hoffmanns or appears in any way to have been intended as a communication to the Hoffmanns regarding the archives. Moreover, to the extent that these statements simply express tentative legal conclusions as to the ownership of the archives, "this would at most create a bailment by operation of law, not an implied-in-fact bailment contract." *Ysasi*, 856 F.2d at 1526.

Plaintiffs also present various recorded testimony of Hoffmann Jr. to the effect that he "was assured on many occasions by officials of the War Crimes Commission that when the Nürnberg proceedings against German industrialists were completed, the Hoffmann Photographic Archives at Nürnberg would be returned to Hoffmann Jr." Pl.'s Statement of Facts ¶ 21. This testimony, however, is unaccompanied by any allegations or evidence of such officials' authority to bind the United States Government. *See* Letter of Heinrich Hoffmann Jr., Ex. P-85 ("I repeatedly received confirmation from various persons that interest in [the archive] would only last for the duration of the Nuremberg Court Trials"); Letter of Heinrich Hoffmann Jr., Ex. P-109 (stating that "I was assured by U.S. officials at Nuremberg that my photo archives were regarded by the U.S. Army as a loan for the duration of the trials"); Dep. of Heinrich Hoffmann Jr., Ex. P-230, at 15

(stating that General Potter "gave me his word that when the books were finished, the entire archives would be brought to location which I would designate," but later received orders to ship the archives to the United States); Affidavit of Heinrich Hoffmann Jr. & Claus Offermann, Ex. P-244, at ¶ 11 (stating that Hoffmann "understood that the United States Government would conclude its use of the photographic archives and return them to him"). Accordingly, such testimony does not carry the burden of showing that an implied-in-fact contract was made. *Pasco Enterprises v. United States*, 13 Cl. Ct. 302, 306-07 (1987).

The court therefore finds that plaintiffs have failed to raise a genuine issue of material fact in support of the theory that an implied-in-fact bailment was created with respect to the Nürnberg photographic archives.

**2. The Photographic Archives Not Subject to the Vesting Order**

Plaintiffs assert that the Army also had control of the photographic archives not subject to the vesting order under an express or implied-in-fact bailment "with the fiduciary duties of accounting, returning, and compensating." Plaintiffs do not provide specific support for a finding that such bailments or fiduciary duties existed, but state simply that "[t]he same principles discussed *supra* respecting the archives made subject to the vesting order are applicable here." Pl.'s Br. Supp. Mot. Summ. J. at 118. Accordingly, the court finds that plaintiffs have failed to raise a genuine issue of material fact in support of the theory that an implied-in-fact bailment was created with respect to the photographic archives not subject to the vesting order.

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**3. The Watercolors**

Plaintiffs also allege that an implied-in-fact bailment was created when the Army took possession of the four Hitler watercolors upon occupying Schloss Dietramszell in 1945 and removed them to the Munich Central Collection Point in May 3, 1946. Pl.'s Statement of Facts ¶¶ 68, 76-77.

In support of this theory, plaintiffs do not allege that the government ever suggested or opined, let alone represented or promised, that the watercolors would someday be returned to the Hoffmanns. Instead, plaintiffs cite deposition testimony of Rosemarie Huber and Elga Bohm that the Munich Central Collection Point was established with the purpose of "identification and return of objects of arts to their rightful owners." Bohm Dep., Ex. P-239, at 10; see also Huber Dep., Ex. P-234, at 7 (testifying that objects of art were brought "to Munich to be registered here, and to be returned to the former owners"). Plaintiffs also paraphrase extensive passages from Lynn H. Nicholas, *The Rape of Europa*, for the proposition that the U.S. government had classified certain works of art as "property of the German nation or the private property of Germans" with the intention of serving as a "trustee" for all such property that was removed to the United States. Pl.'s Statement of Facts at 26-27 n.9.

Even in the light most favorable to plaintiffs, this evidence regarding the general purpose of the Munich Central Collection Point and the intention of the U.S. government with respect to a general category of property is insufficient to support the specific inference that the Army brought the four Hitler watercolors to the Munich Central Collection

Point with the intention of returning them to the Hoffmanns, let alone that such an intention was ever communicated to the Hoffmanns. Accordingly, the court finds that plaintiffs have failed to raise a genuine issue of material fact to support the finding of an implied-in-fact bailment with respect to the Hitler watercolors.

**B. The Fifth Amendment Claims**

Plaintiffs' takings claims are based on the proposition that "non-resident friendly aliens are also entitled to the protection of the Fifth Amendment's prohibition on unlawful taking for public use of their property in the United States without just compensation." See Pl. Br. Supp. Mot. Summ. J. at 102 (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491 (1931)). In *Russian Volunteer Fleet*, the petitioner, a Russian corporation, was the assignee of certain contracts for the construction of two vessels by a New York shipbuilding corporation. 282 U.S. at 487. When the United States requisitioned these contracts, the Court held that the United States had exerted the power of eminent domain in taking the petitioner's property and thereby became bound to pay just compensation. *Id.* at 489.

In finding that the Russian Volunteer Fleet was an "alien friend," the Court cited *Wong Wing v. United States*, 163 U.S. 228 (1896), a case which, while affirming the power of Congress to exclude aliens on the basis of race (as race was then legally constructed), permitted Fifth and Sixth Amendment claims as minimal due process protections for those aliens who had already established residence in the United States. The more general proposition that *non-resident* friendly

aliens with no voluntary or contractual relationship with the United States are entitled to Fifth Amendment rights, however, was emphatically rejected by the Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763 (1950):

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our constitution has even hinted at it. The practice of every modern government is opposed to it.

*Id.* at 784; see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.").

In *Verdugo-Urquidez*, the Court reviewed a series of cases, including *Russian Volunteer Fleet*, that had been cited by the respondent in support of the view that aliens enjoy certain constitutional rights. *Id.* at 270-71. The court concluded that "[t]hese cases . . . establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 271. The respondent was "an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not." *Id.*

Plaintiffs and their predecessors, self-described as "non-resident," have failed to establish the existence of voluntary or contractual relationships with this country that could reasonably be characterized as "substantial connections." Nor have plaintiffs alleged that the United States seized, vested or acquired any of the property pursuant to its eminent domain power. Accordingly, the court will dismiss plaintiffs' Fifth Amendment claims.

**C. The Trading With the Enemy Act Claim**

Plaintiffs challenge the validity of the vesting order under the Trading With the Enemy Act, 50 U.S.C. App. § 9. That statute provides that "[a]ny person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him . . . may file with the said custodian a notice of his claim . . . ."

As the Fifth Circuit noted, § 33 of the Act bars claims under § 9 instituted "after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought." 69 F.3d at 53 (quoting 50 U.S.C. App. § 33 (1988)). Plaintiffs implicitly acknowledge this time bar. *See* Pl.'s Br. Supp. Mot. Summ. J. at 83 ("The only question that remains is can Hoffmann Jr. and von Schirach and their successors commence an action in 1989 when C.A. H-89-815 was filed in the Southern District of Texas?"). They argue, however, that "[n]o statute of limitations runs in favor of a fiduciary who steals or mistreats

the property entrusted to him so long as the fiduciary relationship is not expressly repudiated and such repudiation is communicated to the beneficiary by the malfeasor-fiduciary." *Id.* Whether or not this proposed rule of law is valid and applicable to § 33, plaintiffs have failed to offer facts that show the existence of a fiduciary relationship between the Army and Hoffmann Jr. regarding the vested property. Accordingly, the court finds that plaintiffs have failed to raise a genuine issue of material fact as to whether the validity of the vesting order can be reviewed.[2]

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2. While it is not necessary for the court so to find, plaintiffs' challenge to the vesting order itself appears to be without merit. Plaintiffs contend that vesting order authority under the Act extended only to property that was physically located in the United States prior to December 31, 1946, when President Truman signed a proclamation permitting the resumption of trade between Germany and the United States. Pl.'s Mem. Supp. Summ. J. at 75. The caselaw cited by plaintiffs, however, does not support this proposition. *See Cities Service Co. v. McGrath*, 342 U.S. 330, 333 (1952) (holding that vesting in of debentures physically located outside of the United States fell within "broad terms" of TWEA's vesting authority); *Rogers v. Smith*, 185 F. Supp. 401 (S.D. Ill. 1960) (same); *McGrath v. Agency of Chartered Bank*, 104 F. Supp. 964 (S.D.N.Y. 1952), *aff'd sub. nom. McGranery v. Agency of Chartered Bank*, 201 F.2d 368 (2d Cir. 1953) (same); *Silesian-American Corp. v. Clark*, 332 U.S. 469, 475-76 (1947) (holding that seizure of alien property in time of emergency is a proper exercise of the war power); *Handelsbureau La Mola v. Kennedy*, 299 F.2d 923, 926-27 (D.C. Cir.), *cert. denied*, 370 U.S. 940 (1962) (holding that December 1950 vesting order was proper because "enemy" status under TWEA did not end until the Joint Resolution of Congress of October 19, 1951); *Gmo Niehaus & Co. v. United States*, 170 F. Supp. 419, 421 (1959) (holding that property *acquired by Germans* after December 31, 1946 is not subject

(Cont'd)

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## D. The Tort Claims

### 1. The Watercolors

In *Price*, the Fifth Circuit held that the Federal Tort Claims Act did not confer jurisdiction over a claim against the United States for conversion of the watercolors if an act "inconsistent with [Hoffmann]'s interest in his personal property"; i.e., the watercolors, occurred in Germany. 69 F.3d at 50. Upon reviewing the deposition testimony, submitted by Price, of a German citizen who processed art at the Munich Central Collection Point, the court determined that "other artwork in Hoffmann's collection — artwork not by Adolf

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(Cont'd)
to vesting). The Supreme Court in *Cities Service Co.* emphasized the breadth of the vesting authority:

> We believe that the Trading with the Enemy Act grants the authority necessary to vest obligations evidenced by domestic negotiable bearer debentures even though the debentures themselves are outside the United States. By s 7(c) of the Act, enacted during World War I, the President is given the authority to seize all enemy property, "including . . . choses in action, and rights and claims of every character and description owing or belonging to . . . an enemy . . . ." At the beginning of World War II, Congress made an even broader grant of authority to the Executive through an amendment to s 5(b), providing that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President . . . ."

342 U.S. at 333 (citations omitted).

Hitler, but similarly labeled 'Hoffmann' and found along with the Hitler watercolors and shipped to the central collecting point in Munich—was returned to Hoffmann's son at about the same time that the watercolors were confiscated." *Id.* at 51. For the court, the "crucial[ ]" fact was that the Army's conduct with respect to the watercolors diverged from its contemporaneous treatment of similarly situated art in a manner that was consistent with the owner's interest:

> The divergent treatment afforded various pieces of art in the Hoffmann collection convincingly establishes that the conversion of the watercolors, i.e., an act inconsistent with the Hoffmann family's interest in them, occurred when the United States military authorities ordered their transfer to Wiesbaden and their shipment to the United States.

*Id. See* Restatement of Restitution § 123 cmt. c, at 508 (1937) ("A person who, having acquired the property of another innocently and non-tortiously but without giving value therefor, learns of the interest of another therein, is under a duty to restore it to the owner within a reasonable time, [a]nd any conduct of his thereafter which is inconsistent with the owner's interest is a conversion . . . ."). The court's finding was further "buttressed to the extent that [the United States Army's rules of warfare] may have applied so as not to permit the lawful taking of these watercolors." *Id.* Accordingly, the Fifth Circuit concluded that the conversion claim did not fall within the waiver of sovereign immunity granted by the Federal Tort Claims Act. *Id.* at 52.

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Under established principles of res judicata, this court is not empowered to review the Fifth Circuit's determination that federal courts lack subject matter jurisdiction over plaintiffs' claim for conversion of the watercolors. As the Supreme Court has long recognized, "[t]he principles of res judicata apply to questions of jurisdiction as well as to other issues." *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Association*, 455 U.S. 691, 706 (1982) (citing *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932)). Dismissal of a suit for lack of federal subject matter jurisdiction precludes relitigation of the same issue of subject matter jurisdiction in a second federal suit on the same claim. *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1411 (8th Cir. 1983). Accordingly, the court concludes that plaintiffs have failed to raise a genuine issue of material fact in support of relitigating the issue of jurisdiction under the Federal Tort Claims Act for conversion of the watercolors.[3]

---

3. Plaintiffs contend that the Fifth Circuit's finding in *Price* was erroneous to the extent that the Fifth Circuit relied on the deponent's testimony that the watercolors were "confiscated" in Munich prior to their transfer to Wiesbaden and shipment to the United States. In support of this contention, plaintiffs have submitted new testimony to the effect that the word used by the German witness, "beschlagnahme," does not mean "confiscate" in the sense of state action to deprive of ownership, but rather should be translated "taken into possession." *See* Pl.'s Statement of Facts ¶ 72; Ex. P-402, ¶¶ 4-11. The court fails to see how even this translation disturbs the conclusion that the watercolors were never returned to the Hoffmanns, and were thereby afforded "divergent treatment" from that given contemporaneously to the artwork that was returned to Hoffmann Jr.

**2. The Photographic Archives Not Covered by the Vesting Order (Other Than the Time-Life Archives)**

Plaintiffs' conversion claims for the photographic archives not covered by the vesting order are subject to the statute of limitations under the Federal Tort Claims Act, which provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

Plaintiffs contend that the claim for conversion for "most" of the archives not covered by the vesting order "accrued" when plaintiffs' "1983 and 1996 demands for the return of those archives were denied by the government" in January and February 1997. Pl.'s Br. Supp. Summ. J. at 138. A claim accrues within the meaning of § 2401(b), however, when the plaintiff becomes aware of both the existence and the cause of his injury. *United States v. Kubrick*, 444 U.S. 111, 117 (1979). In this case, plaintiffs' evidence indicates that on May 20, 1949, Hoffmann Jr. was aware of both the removal and the cause of the removal of the "entire Hoffmann file" to the United States. Hoffmann Jr.'s letter to the Army's Historical Division in Europe on June 17, 1949 states that:

> On 20 May 49 I was informed by Major Murphy, Historical Division, Frankfurt/Main, that my entire photo archive had been forwarded to Washington and I had no right to claim its return.

> Because of the foregoing, as owner, I am compelled to lodge protest.

*See* Pl.'s Statement of Facts ¶ 34; Ex. P-85. Making clear that by his "entire" archive Hoffmann Jr. was not merely referring to the Nürnberg archive, the same letter also states that "[o]ne part of the entire archive, the part that happened to be in the American zone of occupation, was removed to Nuremberg" and that "this part of the former entire archive is all that I have left after the war." Ex. P-85. The court concludes that plaintiffs' conversion claims for the photographic archives taken by the Army and not covered by the vesting order accrued on May 20, 1949. Because plaintiffs have alleged elsewhere that the Time-Life portions of the archives were not part of the archives taken and transported by the Army, however, the Time-Life archives are excluded from this determination. *See* Pl.'s Statement of Facts ¶¶ 48-51.

Plaintiffs also note that this "suit was filed within two weeks after the last rejection of the [1996] claim." Pl.'s Br. Supp. Summ. J. at 138. That an action seeking judicial review of a time-barred claim was filed promptly after an agency denial, however, does not suffice to resurrect the claim. The provisions of § 2401(b) are read conjunctively, as jurisdictional requirements, not disjunctively, as independent bases for jurisdiction. *Schuler v. United States*, 628 F.2d 199, 201 (D.C. Cir. 1980) (en banc) ("Though the section is not happily drafted, common sense and the legislative history tell us that it requires the claimant both to file the claim with the agency within two years after accrual of the claim and then to file a complaint in the District Court within six months

after the agency denies the claim."). Because there is no genuine issue of material fact as to when the claim for conversion of the archives not covered by the vesting order (other than the Time-Life archives) accrued, the court will grant summary judgment for defendants on the tort claims as to those archives.

**3. The Time-Life Archives**

Plaintiffs contend that Time-Life stole part of the Berlin portion of the Hoffmann Photographic Archives during the war and donated some or all of the stolen archives to the U.S. Army in 1981 and 1983, and that Hoffmann Jr. first learned of the existence of the stolen archives in early 1983. In support of these allegations, plaintiffs offer letters from employees of Time-Life Books and the United States Army Military History Institute indicating that in 1981 and 1983, the Institute accepted donations of some 7,000 "Heinrich Hoffmann prints" that had been "confiscated from Hoffmann's Berlin studio in May, 1945 by a LIFE magazine photographer." Ex. P-163, P-164, P-165, P-182A, P-183. Plaintiffs have also filed an affidavit from Hoffmann Jr. that he met Price in early 1983, learned of the stolen archives from Price, and verified that the archives stored at the institute were part of his father's Berlin archives. Ex. P-244 at ¶¶ 19, 20. Finally, plaintiffs have submitted a written FTCA claim filed by Price and Hoffmann Jr. with the Houston office of the Department of Justice Civil Division on May 10, 1984. Ex. P-208; Consolidated Complaint ¶ 87.

Defendants do not contest these facts or contend that plaintiffs' claims regarding the Time-Life Archives are barred

by the statute of limitations. Defendants correctly note, however, that each and every claimant is required to file an administrative claim in order to pursue a tort claim under the FTCA. *See Pipkin v. United States Postal Service*, 951 F.2d 272, 273 (10th Cir. 1991) (barring wife's claim for failure to exhaust administrative remedies, even though husband had filed an administrative claim). Plaintiffs have therefore conceded that the Estate of Henriette Hoffmann von Schirach may not recover for the Time-Life Archives in this action. Pl.'s Br. Supp. Mot. Summ. J. at 178.

Defendants also contend that plaintiffs' claims for the Time-Life archive should be dismissed because they have already been the subject of the settlement of a civil action by plaintiffs against Time, Inc. Pl.'s Resp. to Def.'s Req. for Admission 22(a). Defendants assert that plaintiffs "have refused to disclose either the facts underlying their claim, or the terms of the settlement." Def.'s Mem. Supp. Renewed Mot. Summ. J. at 12 n.6. Plaintiffs have not responded to this assertion. Because "a final judgment, whether arrived at by way of a settlement agreement or an adjudication on the merits, does extinguish a party's claim to remedies pertaining to 'all or any part of the transaction, or series of connected transactions, out of which the action arose,' " *Hydrocarbon Trading & Transport Co., Inc. v. Dep't of Energy*, 1995 WL 317424, at *5 (D.D.C. 1995) (quoting Restatement (Second) of Judgments § 24 (1982)), defendants are entitled to know the facts underlying plaintiffs' claim for the Time-Life archives and the terms of the settlement with Time, Inc..

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**4. The Vested Archives**

Plaintiffs allege that "Government employees and others unknown conspired prior to the issuance of the void vesting order to convert the Hoffmann Photographic Archives and thus committed the tort of conspiracy," Pl.'s Br. Supp. Summ. J. at 107, and then fraudulently concealed this conspiracy. Consolidated Complaint ¶ 123. According to plaintiffs, the substantive offense underlying this conspiracy was the alleged breach of the Army's fiduciary duties to return the Hoffmann Photographic Archives and to pay for Hoffmann's loss of use. *Id.* at 108. Because plaintiffs have failed to offer evidence that would permit the review of the validity of the vesting order or support the finding of such fiduciary duties, summary judgment will be granted against the conspiracy claims and, a fortiori, the fraudulent conspiracy claims.

**IV. Conclusion**

For the foregoing reasons, it is this 28th day of June, 1999, hereby

**ORDERED** that defendants' motion for summary judgment is **GRANTED** as to counts 3, 4, 9, 10, 11, 12, 14, 16 and 18 of the Consolidated Complaint; and it is further

**ORDERED** that defendants' motion for summary judgment is **DENIED** as to counts 13 and 15 of the Consolidated Complaint; and it is further

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**ORDERED** that the clerk shall schedule a status hearing to address the procedure to be followed to determine whether the settlement of the plaintiffs' litigation against Time-Life, Inc. precludes plaintiffs' claims regarding the Time-Life Archives.

s/ Henry H. Kennedy, Jr.
Henry H. Kennedy, Jr.
U.S. District Judge

## APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED SEPTEMBER 9, 1999

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**Civil Action 98-00857**

**HENRIETTE HOFFMAN VON SCHIRACH, ROBERT H. HOFFMAN, HEIDEMARIE KRUGER and SUSANNE HUSTADT,**

**Plaintiffs,**

**v.**

**UNITED STATES OF AMERICA,**

**Defendant.**

**ORDER**

The court has been advised by plaintiffs' counsel that plaintiffs have chosen to relinquish their claims to the items referenced in the court's June 28, 1999, Memorandum Opinion as the Time Life Archive. Consequently, pursuant to Fed. R. Civ. P. 58 and for the reasons stated by the court in its Memorandum Opinion, it is on this 9th day of September, 1999, hereby

**ORDERED and ADJUDGED** that judgment is entered for the defendant; and it is further

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**ORDERED and ADJUDGED** that the complaint in this case is dismissed with prejudice.

s/ Henry H. Kennedy, Jr.
Henry H. Kennedy, Jr.
United States District Judge

Dated: 9/9/99

## APPENDIX H — CONSTITUTIONAL PROVISION, TREATIES, STATUTES, PRESIDENTIAL MESSAGE, RULES, AND DEP'T OF THE ARMY PAMPHLET INVOLVED

### I U.S. Constitution, Fifth Amendment

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

### II ANNEX to the HAGUE CONVENTION (IV) Adopted by the Geneva Protocols of 1929 Regulations Respecting the Laws and Customs of War on Land

* * *

ARTICLE 23.

In addition to the prohibitions provided by special Conventions, it is especially forbidden —

*a.* To employ poison or poisoned weapons;

*b.* To kill or wound treacherously individuals belonging to the hostile nation or army.

*c.* To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

*d.* To declare that no quarter will be given;

*e.* To employ arms, projectiles, or material calculated to cause unnecessary suffering;

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*f.* To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

*g.* To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

*h.* To declare abolished, suspended, or inadmissible in a Court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

* * *

ARTICLE 27.

In sieges and bombardments all necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

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ARTICLE 28.

The pillage of a town or place, even when taken by assault, is prohibited.

* * *

ARTICLE 46.

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

ARTICLE 47.

Pillage is formally forbidden.

* * *

ARTICLE 52.

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of the war against their country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

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Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

ARTICLE 53.

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for operations of the war.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

ARTICLE 54.

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

ARTICLE 55.

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

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ARTICLE 56.

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure or destruction of, or wilful damage to, institutitions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

* * * *

## III COVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

**(Hague IV 1907)**

* * *

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

They declare that it is in this sense especially that Articles 1 and 2 of the Regulations dopted must be understood.

* * *

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Article 1. The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

Article 2. The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

Article 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Article 4. The present Convention, duly ratified, shall as between the Contracting Powers, be substituted for the Convention of 29 July 1899, respecting the laws and customs of war on land.

The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.

* * * *

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## IV TITLE 50, APPENDIX – WAR AND NATIONAL DEFENSE

### § 2 Definitions

The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and this Act.

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

* * *

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The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

* * * *

**§ 5. Suspension of provisions relating to ally of enemy; regulation of transactions in foreign exchange of gold or silver, property transfers, vested interests, enforcement and penalties**

* * *

(b)(1) During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent and prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the

national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody of such person.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof: *Provided, however*, That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subsection, for any or all of the terms used in this subdivision. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

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## V President Truman's message of July 9, 1951 (1951 U.S.C.C.A.N. 2358-2359)

Furthermore, it is not intended that the termination of the state of war shall in any way change or alter the program, which Congress has authorized, of seizing, under the Trading With the Enemy Act, German property in this country on or before December 31, 1946, and using the proceeds to pay just and legitimate claims arising from the war in accordance with the War Claims Act of 1948. The vesting of German property under this program does not extend to property acquired since the resumption of trade with Germany on January 1, 1947, following the cessation of hostilities. It is limited to German property and rights located here before or during the period of hostilities.

Most of this German property has already been identified and vested. This Government does not intend to embark on any new program in this field. However, some of the property already subject to vesting [since it was in the United States before December 31, 1946] is believed to be cloaked or hidden and not yet discovered, and some is still under examination or subject to legal proceedings. Most of the property remaining unvested is involved in problems of conflicting jurisdiction between this and other governments, which are in the process of settlement by negotiation under authority of legislation which was enacted in September of last year.

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Should the vesting power lapse immediately, this Government would find it difficult to wind up this program in an orderly way, or to carry out its commitments for the equitable settlement of intergovernmental differences relating to enemy property.

Completion of the vesting of wartime enemy property, even after the conclusion of peace, is commonly accepted practice in connection with the settlement of claims between the nations which were at war. Our peace treaties with Bulgaria, Hungary, Rumania, and Italy all authorize the continued vesting and retention of such property.

In the absence of treaty provisions, however, there may be legal obstacles to the continued vesting of German property, after the termination of the state of war, unless there are changes in our existing statutes. According to the terms of the Trading With the Enemy Act, many of its powers expire at the "end of the war," a phrase which the act defines to mean the date of proclaiming the exchange of ratifications of a treaty of peace, or an earlier date fixed by Presidential proclamation. There is some doubt that the vesting powers of the Trading With the Enemy Act can be exercised after the termination of the state of war, unless expressly provided for in new legislation.

This doubt should be eliminated, and it should be made clear that the Congress intends the vesting of German property for the purpose of paying war claims to continue.

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## VI FEDERAL RULES OF CIVIL PROCEDURE

### Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

### Rule 2. One Form of Action

There shall be one form of action to be known as "civil action".

## VII U.S. WAR DEPARTMENT (1940) Rules of Land Warfare

* * *

313. Destruction and seizure of. — It is especially forbidden * * * to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war *(H.R., art. 23, par. (g))*.

314. General rule as to war right to seize and destroy property. — The rule is that in war a belligerent may destroy or seize all property of whatever nature, public or private,

hostile or neutral, unless such property is specifically protected by some definitive law of war, provided such destruction or seizure is imperatively demanded by the necessities of war.

315. Real property of a State. — The occupying State shall be regarded as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State and situated in the occupied territory. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct (*H.R. art. 55*).

316. Occupant's disposition of such property. — The occupant does not have the absolute right of disposal or sale of enemy real property. As administrator or usufructuary be should not exercise his rights in such wasteful and negligent manner as seriously to impair its value. He may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. A lease or contract should not extend beyond the conclusion of the war.

* * *

318. Property of municipalities, etc. — The property of municipalities, that of institutions dedicated to religion, charity, and education, the arts and sciences, even when State property, shall be treated as private property.

All seizures of, destruction, or willful damage done to institutions of this character, historic monuments, works of

art, science, is forbidden and should be made the subject of legal proceedings *(H.R., art. 56)*.

319. Authorized treatment. — The property included in the foregoing rule may be utilized in case of necessity for quartering the troops, the sick and wounded, horses, stores, etc., and generally as prescribed for private property. Such property must, however, be secured against all avoidable injury, even when located in fortified places which are subject to seizure or bombardment.

320. Movable property. — An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations *(H.R., art. 53, par. 1)*.

321. Two classes of movable property. — All movable property belonging to the State directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader's government. Other movable property, not directly susceptible of military use, must be respected and cannot be appropriated.

322. Property of unknown ownership treated as public property. — Where the ownership of property is unknown — that is, where there is any doubt as to whether it is public or private, as frequently happens — it should be treated as public property until ownership is definitely settled.

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## PRIVATE PROPERTY

323. Must be respected — Private property * * * must be respected *(H.R., art. 46, par. 1)*.

324. Devastation. — The measure of permissible devastation is found in the strict necessities of war. As an end in itself, as a separate measure of war, devastation is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. Thus the rule requiring respect for private property is not violated through damage resulting from operations, movements, or combats of the army; that is, real estate may be utilized for marches, camp sites, construction of trenches, etc. Buildings may be used for shelter for troops, the sick and wounded, for animals, for reconnaissance, cover defense, etc. Fences, woods, crops, buildings, etc., may be demolished, cut down, and removed to clear a field of fire, to construct bridges, to furnish fuel if imperatively needed for the army.

325. American rule. — This rule (respect for private property, etc.) does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, boats or ships, and lands, for temporary and military use.

326. Confiscation. — Private property cannot be confiscated *(H.R., art. 46, par. 2)*.

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328. Private gain by officers and soldiers prohibited. — Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate.

329. Pillage. — Pillage is formally forbidden *(H.R., art. 47)*.

330. Seizure and devastation of private property. — Private property can be seized only by way of military necessity for the support or other benefit of the army or of the occupant. All destruction of property not commanded by the authorized officer, all pillage or sacking, even after taking a town or place by assault, are prohibited under the penalty of death or such other severe punishment as may seem adequate to the gravity of the offense.

331. Private property susceptible of direct military use. — All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is declared *(H.R, art. 53, par. 2)*.

332. What included in rule. — The foregoing rule includes everything susceptible of direct military use, such as cables, telephone and telegraph plants, horses and other draft and riding animals, motors, bicycles, motorcycles, carts,

wagons, carriages, railways, railway plants, tramways, ships in port, all manner of craft in canals and rivers, balloons, airships, airplanes, depots of arms, whether military or sporting, and in general all kinds of war material.

333. Destruction of such property. — The destruction of the foregoing property and all damage to the same is justifiable if it is required by the exigencies of the war.

334. Submarine cables. — Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made (*H.R., art. 54*).

REQUISITIONS

335. Requisitions. — Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible *(H.R., art. 52)*.

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336. What may be requisitioned. — Practically everything may be requisitioned under this article that is necessary for the maintenance of the army, such as fuel, food, forage, clothing, tobacco, printing presses, type, leather, cloth, etc. Billeting of troops for quarters and subsistence is also authorized.

* * *

338. The amount taken. — The expression "needs of the army" was adopted rather than "necessities of the war" as more favorable to the inhabitants, but the commander is not thereby limited to the absolute needs of the troops actually present. The object was to avoid reducing the population to starvation.

339. Fixing prices — The prices of articles requisitioned will be fixed by agreement if possible, otherwise by military authority. The prices of commodities on sale may also be regulated and limits placed on the hours and places of trading. All authorities agree that it is good policy to pay cash is possible and to take up receipts as soon as possible.

* * *

CONTRIBUTIONS

341. Contributions. — If, in addition to the taxes mentioned in the above article (art. 48; see par. 294), the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question (*H.R. art. 49*).

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342. Methods of levying contributions. — No contributiobn shall be collected except under a written order and on the responsibility of a commander in chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributor (*H.R., art. 51*).

* * * *

**VIII 2 International Law**
**(Department of the Army Pamphlet 27-161-2 (1962))**

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## III. PROPERTY IN OCCUPIED AREAS

### A. Military Commander's Power Over Property in Occupied Areas

The powers which a military commander may exercise over property in enemy territory may be classified broadly as destruction, confiscation, seizure, requisition, and control. An analysis of the nature of each of these powers will illustrate the lawful extent to which each may be exercised.

1. *Destruction.* Destruction is the partial or total damage of property. Property of any type or ownership may be

damaged where such is necessary to, or results from, military operations either during or preparatory to combat. Destruction is forbidden except where there is some reasonable connection between the destruction of the property and the overcoming of the enemy army. Two treaties have specifically laid down rules as to destruction, Article 23(g) of the Hague Regulations, and Article 53 of the Geneva Civilian Convention.

a. *Article 23 (g), The Hague Regulations.*

> It is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

This rule covers all property in any territory involved in a war, whether that property is in occupied territory or not, and whether that property is publicly or privately owned. Paragraph 56, FM 27-10, should be construed as illustrating only a part of the destruction permissible under Art. 23(g), *H.R.* The acts listed in paragraph 56, FM 27-10 apply to hostilities or to invasion. However, they are not the direct result of hostilities itself, such as damage from explosives but are rather acts done incidental to or in preparation for fighting (such as the use of real estate as a camp site, or as a path of march, the use of buildings as forts or hospitals, the demolition of crops, buildings, or roads in order to make a landing strip, clear a field of fire, or furnish fuel). They therefore furnish a guide to the permissible destruction in

occupied areas.[79] FM 27-10 offers further assistance to permissible destruction in occupied areas by authorizing the destruction of enemy fortifications and stores located in an area which has surrendered.[80]

Article 23(g) *H.R.* has been supplemented as far as occupation is concerned by Art. 53 of the 1949 Geneva Civilian Convention.

* * *

2. *Confiscation.* Confiscation is the taking of enemy public movable property without obligation to compensate the State to which it belongs. The term only applies to *public* property because *H.R.* Art. 46 specifically forbids the confiscation of private property.[85] It is further limited to

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79. Para. 56 is the same as para. 324 of FM 27-10 (1940). It was moved from the section on private property in occupied areas in the 1940 edition to a spot in the 1956 edition more appropriate to acts committed in actual combat.

80. FM 27-10, para. 41.

85. An exception is made to the rule that private property may not be confiscated by permitting confiscation of certain items of private property found on the battlefield (FM 27-10, para. 59 *b*). With the depth and fluidity of modern battle zones it is sometimes difficult to determine when an area becomes or ceases to be a "battlefield" thereby increasing the danger that this exception may partly undermine the Hague prohibition. Such private property is called "booty of war." See JAGW 1956/8332 (9 Nov. 1956 wherein the opinion is expressed that Goering's heavily armored car equipped

(Cont'd)

public *movable* property because *H.R.*, Art. 55 permits the Occupant to act only as an administrator and usufructuary of public immovable property. The restrictions on confiscation apply only to occupied areas and to the battlefield, not to the domestic territory of the parties.

All enemy public movable property captured or found on a battlefield may be confiscated.[86] However, only certain categories of public movable property may be confiscated in occupied areas. *H.R.*, Art. 53(1) lists the items which can be confiscated in occupied territory.

> An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally all movable property belonging to the State which may be used for military operation.

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with bullet proof glass taken on the battlefield could be confiscated. In JAGW 1957/5906 (15 July 1957) the question arose whether or not expensive Hungarian horses now in the United States were "found on the battlefield." An extension of this idea of "booty" may be observed in JAGA 1947/5986, JAGW 1957/2121, and JAGW 1957/1052, wherein the opinion is expressed that field marshals' batons could be confiscated in cases where they were adorned with swastikas and were generally symbolic of the Nazi Party.

86. FM 27-10, para. 59 a. Public property so found is also termed "booty of war." On "booty" generally see Freeman, "General Note on the Law of War Booty," 40 *AJII* 795; and Smith, "Booty of War," 23 *Brit. Year Bk. of IL* 227 (1946).

Such public movable property need not be directly usuable for military operations, as ammunition, but includes property indirectly serving the same purpose. In modern total war military value can be found in a great many items. However, if the property cannot be used either directly or indirectly for military operations it cannot be confiscated.

3. *Seizure*

a. *Its nature and limitations*. Seizure is the taking of certain types of enemy *private* movable property for use of the capturing State. Such use is not confined to the needs of the occupying army. Items seized may be employed outside as well as within the occupied territory. The items seized must be returned or compensation fixed when peace is made. This is one of the principal differences between seizure and confiscation.

The concept of seizure does not apply to public property because movable public property of a military value may be confiscated. Public immovable property can only be administered, title remaining always in the enemy State.

The concept also does not apply to private immovable property. "Immovable private property may under no circumstances be seized."[87] This general rule, which appears absolute, is however modified in the case of railway plants, port facilities, airfields, and telephone and telegraph plants, all of which are closely connected with communication and transportation systems.[88]

87. FM 27-10, para. 407.

88. FM 27-10, para. 410 *a*.

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Article 53 (2), *H.R.* lists the types of private movable property which may be seized. They are (1) appliances adapted to the transmission of news; (2) transportation; (3) depots of arms and all kinds of ammunition of war. The seizure of this property is not based, as in the case of requisitions, on the needs of the army of occupation but on the danger of permitting property susceptible of direct military use to remain at the disposal of private individuals.

Appliances adapted to the transmission of news include cables, radios, television and telecommunications equipment.[89]

Appliances adapted as a means of transportation include motor vehicles, railways, ships in port, barges and other watercraft, and aircraft.

Arms and munitions of war include all varieties of military equipment, including that in the hands of manufacturers, component parts of or material suitable only for use in the foregoing, and in general all kinds of war materials.[90] It will be noted that many items that could be extremely useful to a State at war are not included. Such items in occupied areas are heavy industry not yet converted to war production, crude oil, and other petroleum products. Efforts to interpret broadly the term of the Hague Regulations "ammunition of war" have not been successful.[91] Private property subject to seizure remains limited by the 1907 Hague Regulations.

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89. Id.

90. Id.

91. See Lauterpacht, "Hague Regulations and the Seizure of Munitions de Guerre," 32 *Brit. Year Bk. of IL* 218 (1955).

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### (b) *Cases growing out of seizures in World War II.*

#### (1) *United States v. Krupp*[92]

In the early part of 1941 the German High Command instituted a new submarine building program, which was participated in by the Krupp subsidiary of the Krupp Stahlban in Reinhausen. One of the managers of this plant was sent to France in the company of a naval officer of the Armament Inspectorate of the Navy High Command in order to find bending roll machines of greater dimensions than were available at the Krupp plants. They immediately placed "seized" signs upon the machines. The director of the Alsthom plant objected on the ground that the machines were the only ones suitable for the construction of boiler drums and high pressure tubes. Neither had been used for military purposes. The objections raised to the seizure were of no avail and shortly afterwards the machines were dismantled by Krupp workmen and carried off to Germany. They were used in the submarine building program until the end of the war when they were found and finally brought back to the Alsthom plant. The removal and detention of those machines was considered a violation of Article 46 of the Hague Regulations.

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92. 10 *Law Reports of Trials of War Criminals*, pp. 88, 89., IX *Trials of War Criminals*, pp. 1358-1361.

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### (2) *United States v. Flick et al*[93]

Flick was the principal proprietor and active head of a large group of industrial enterprises including coal and iron mines and steel producing plants. He and some of his associates were tried after World War II for the unlawful seizure and exploitation of public and private property in occupied territory. Excerpts from the judgement of the court are as follows:

". . . Flick and his assistants Weiss, Burkart and Kaletsch are accused of exploiting properties which for convenience during the trial have been called Rombach in Lorraine; Vairogs in Latvia; and Dnjepr Stahl [Dnepr Steel], in the Ukraine. . . .

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"Prior to the First World War when Lorraine was German, a large plant was built by German capital near the town of Rombach. After that war it was expropriated by France from whom the title was acquired by a French corporation dominated by the Laurent family. The enterprise consisted in 1940 principally of blast furnaces, Thomas works, rolling mills and cement works. . . . When the German Army invaded Lorraine in 1940, the management fled but many of the workers including technicians remained. . . . In any event a

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93. VI *Trials of War Criminals*, pp. 1187-1123, at pp. 1202-1212. *Annual Digest 1947*, pp. 266-274; IX *LRTWC* 1-59. See also *U.S. v. Krauch* (I. G. Farben Inc.) VIII *Trials of War Criminals* pp. 1128-1167 for the seizure of private chemical industries in occupied areas.

public commissioner or administrator was appointed for the Rombach plant and ultimately executed a contract with the Friedrich Flick Kommanditgesellschaft called 'use of enterprise conveyance agreement' dated 15 December 1942 but effective as of 1 March 1941 when the Flick group took possession. . . . Flick, had the hope of ultimately acquiring title to the respective properties and this trusteeship was sought to that end. . . . At no time, however, was there any definite sale commitment and of course the hope of its realization was frustrated by the fortunes of war. . . . A corporation called Rombacher Huettenwerke, G.m.b.H, was organized by Flick to operate the plant. . . . All the profits were invested in repairs, improvements and new installations. . . . The evidence satisfied us that the trustee left the properties in better condition than when they were taken over. . . .

"The seizure of Rombach in the first instance may be defended upon the ground of military necessity. The possibility of its use by the French, the absence of responsible management and the need for finding work for the idle population are all factors that the German authorities may have taken into consideration. Military necessity is a broad term. Its interpretation involves the exercise of some discretion. If after seizure the German authorities had treated their possession as conservatory for the rightful owners' interest, little fault could be found with the subsequent conduct of those in possession.

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". . . Flick saw the possibilities resulting from the invasion and sought to add the Rombach property to his

concern. But governmental policy was otherwise. It does not appear upon what grounds this decision was based. There may have been thought of the Hague Regulations under which private property must be respected and cannot be confiscated. But we recall no hint in the evidence that Flick or his associates gave any thought to the international law affecting the transaction. The Flick management of Rombach was conservative, not, however, with the intent of benefiting the French owners. . . . His expectation of ownership caused him to plow back into the physical property the profits of operation. . . .

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" While the original seizure may not have been unlawful, its subsequent detention from the rightful owners was wrongful. For this and other damage they may be compensated. . . .

". . . In this case Flick's acts and conduct contributed to a violation of Hague Regulation 46 that is, that private property must be respected. Of this there can be no doubt. But his acts were not within his knowledge intended to contribute to a program of 'systematic plunder' conceived by the Hitler regime and for which many of the major war criminal have been punished. . . .

". . . They [Hague Regulations] were written in a day when armies traveled on foot, in horse-drawn vehicles and on railroad trains; the automobile was in its Ford model-T stage. Use of the airplane as an instrument of war was merely a dream. The atomic bomb was beyond the realms of

imagination. Concentration of industry into huge organizations transcending national boundaries had barely begun. Blockades were the principal means of 'economic warfare.' 'Total warfare' only became a reality in the recent conflict. These developments make plain the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment. Guilt, or the extent thereof, may not be determined theoretically, or abstractly. Reasonable and practical standards must be considered.

". . . The Tribunal will find defendant Flick guilty in respect to the Rombach matter but will take fully into consideration in fixing his punishment all the circumstances under which he acted.

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"Vairogs and Dnjepr Stahl have similar factual situations. The former was a railroad car and engine factory in Riga, once owned by a Flick subsidiary, sold to the Latvian State about 1936 and expropriated in 1940 as the property of the Soviet Government. Dnjepr Stahl was a large industrial group — three foundries, two tube plants, a rolling mill, and machine factory — also owned by the Russian Government. These plants had been stripped of usuable movables when the Russian Army retreated eastward and further steps had been taken to render them useless to the Germans. Dnjepr Stahl particularly had been largely dismantled and immovables seriously damaged or destroyed. Over one million Reichsmarks of German funds at Vairogs and

20 million at Dnjepr Stahl were spent in reactivating the plants. They were in the possession of Flick subsidiary companies as trustees, the former for less than 2 years, beginning in October 1942, the latter for the first 8 months of 1943.

". . . When the German civilians departed all plants were undamaged and in the absence of evidence to the contrary we may assume so remained when the Russians returned.

"The only activity of the individual defendants in respect to these industries was in negotiating the procurement of trustee contracts. . . .

"These activities stand on a different legal basis from those at Rombach. Both properties belonged to the Soviet Government.

The Dnjepr Stahl plant had been used for armament production by the Russians. The other was devoted principally to production of railroad cars and equipment. No single one of the Hague Regulations above quoted is exactly in point, but, adopting the method used by IMT, we deduce from all of them, considered as a whole, the principle that state-owned property of this character may be seized and operated for the benefit of the belligerent occupant for the duration of the occupancy. The attempt of the German Government to seize them as the property of the Reich of course was not effective. Title was not acquired nor could it be conveyed by the German Government. The occupant, however, had a usufructuary privilege. Property which the

government itself could have operated for its benefit could also legally be operated by a trustee. We regard as immaterial Flick's purpose ultimately to acquire title. To covet is a sin under the Decalogue but not a violation of the Hague Regulations nor a war crime. We have already expressed our views as to the evacuation of movables from these plants. Weiss congratulated the manager of Vairogs upon his success in moving out machinery and equipment. In this we see nothing incriminating since Weiss neither had nor attempted to exercise any control of the evacuation and learned of it only after it was accomplished. We conclude, therefore, that there was no criminal offence for which any of the defendants may be punished in connection with Vairogs and Dnjepr Stahl."

(3) *Singapore Oil Stocks.*[94] When the Japanese occupied the Netherlands East Indies in 1942 they seized the crude oil stocks of private oil companies. This oil, which had to be pumped out of the ground and refined, was transferred out of the occupied area and used to further the Japanese war efforts in other parts of Asia. After the war, some of this refined oil was found stored in Singapore. The British confiscated it as "booty of war." The private oil companies contested this act on the part of Britain on the ground that the Japanese had no title to this on which the British could obtain. The Court concluded as follows:

"The seizure of the oil resources of the Netherlands Indies was economic plunder, the crude oil in the ground

94. *N.V. De Bataafsche Petroleum Maatschappli and Ors. v. The War Damage Commission*, reproduced in 51 *American Journal of International Law* 802 (1957).

was not a '*munitions-de-guerre.*' The court also held that any Netherlands Indies law which operated to vest title in the refiner, here the Japanese could not purge the Japanese of their original violation of the Hague Regulations. Therefore judgment was given to the private owners.

4. *Requisition.* Requisition is the method of taking private enemy movable *and* immovable property for the needs of the army of occupation. It differs from seizure in four respects. (a) The items taken by requisition may be used only in the occupied territory. (b) Practically everything may be requisitioned that is necessary for the day-to-day maintenance of the army of occupation. The power to requisition is not limited to certain classes of property as is seizure. (c) Private immovable as well as private movable property may be requisitioned. Only private movable property may be seized. (d) The owners are to be compensated as soon as possible. They do not have to wait for the restoration of peace.[95]

* * *

5. *Control.* All property within occupied territory may be controlled by the occupant to the degree necessary to prevent its use for the benefit of the enemy or in a manner harmful to the occupant.[101] Property control is temporary in nature. The property must be returned to the owners when the reason for the control no longer exists. Therefore, the

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95. *H.R.*, Art. 52, and *GC* Art. 55, define the powers of the occupation authorities in regard to requisitions.

101. FM 27-10, para. 399.

control must not extend to confiscation, whether such confiscation is accomplished by outright taking, or by subtler methods such as forced sales and depletion.

Control may also be exercised over property of unknown ownership or over property of individuals who are not present to care for it themselves.

The authority of the occupant to impose such controls does not limit its power to confiscate, seize or requisition certain property. The power to control is broader than these three concepts.[102]

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102. See Military Government Law No. 52. "Blocking and Control of Property," (Military Government Gazette, Germany, 1 June 1946, pp. 24-27) for a comprehensive attempt to control property transactions in an occupied area. German Supreme Court held on 24 June 1957 that MG Law 52 was designed to protect the property interests of the owner as well as the security of the occupant (Case digested in 63 *Am. J. Int'l L.* 457 (1957)).